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SELECT CASES
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ON THE
LAW OF PROPERTY.

SELECT CASES
AND
OTHER AUTHORITIES
ON THE
LAW OF PROPERTY.

BY
JOHN CHIPMAN GRAY,
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VOLUME I.

SECOND EDITION.

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PREFACE TO THE SECOND EDITION.

THE experience of the seventeen years since the publication of the first two volumes has convinced me that they contain more cases than can be satisfactorily treated in a single course of lectures. It has also confirmed my opinion that a collection of cases should not attempt to cover too much ground, but that the cases should be multiplied on the crucial topics. A single case on a subject has little advantage over a text-book. It is only by presenting a doctrine in many aspects that the best results can be reached.

I have tried to bear both these points in mind in the present edition, in which about two hundred pages have been stricken out, and one hundred added, in each of the two volumes.

To my colleague, Professor J. I. Westengard, I am indebted for collecting the cases reported since the first edition, and for constant advice and assistance in selection and arrangement. He has also contributed several valuable notes. I would especially call attention to the note on Distress. If the present edition of these volumes is an improvement on the earlier one, it is largely due to him.

I have also to thank my learned friend, Robert Walcott, Esquire, for seeing the volumes through the press.

PREFACE.

THIS Collection of Cases is prepared for the convenience of students in the Law School of Harvard University.

The head-notes are always, and the arguments generally, omitted.

As one of the main objects in the study of cases is to acquire skill and confidence in extracting the *ratio decidendi*, the omission of head-notes from a collection like this is an essential part of the scheme. To thrust before the eyes of a student of law the answer to the problem contained in a case is like telling a student in arithmetic the answer to his sum before he does it, with the additional disadvantage that the answer in the head-note is often wrong.

On the other hand, the omission of the arguments is an evil, but a necessary one. To have retained them would either have compelled the exclusion of many valuable cases, or else have swollen the size and expense of volumes already larger and more costly than I could wish.

With the exception of the head-notes and arguments, and of a few passages the omission of which is duly noted, the cases are reprinted literally from the reports; but I have striven after some consistency in the use of capitals and italics, and where a citation was obviously wrong, I have corrected it.

The book is intended for study, not for practice. That one who has carefully read these cases will find the volumes of considerable aid in after professional life, I have no doubt; but by one who has not thus become acquainted with their contents, the want of head-notes will probably be felt an invincible obstacle to their use.

Further, the reading of these cases, it should be remembered, is intended to be accompanied by oral instruction, and therefore they are without the comments which would, on so difficult a subject, be desirable, if the cases were meant for solitary study.

As any one will find who attempts to compile a collection of cases, it is hard to make it small enough. I have tried to limit myself to the leading and illustrative authorities, and in the few notes no attempt has been made at a full collection of the decisions, — indeed, no case is ever referred to without a distinct reason for calling attention to it.

A special difficulty in dealing with the law of property, and particularly of real property, is to determine how much to dwell on parts of the law which have now become practically obsolete. No two persons would probably decide this question in exactly the same way. I have endeavored to bear in mind, on the one hand, that a real knowledge of the law as it is, requires a knowledge of the law as it has been; and, on the other, that I am working for men who are preparing themselves to be lawyers, and not merely for students of the history of institutions.

For the parts of the law of which he treats and for which it was impossible or undesirable to give cases, I have had recourse to the terse and exact sentences of Littleton.

I desire especially to acknowledge the aid I have received from Mr. Leake's Digest of the Law of Land. This excellent book (unfortunately not finished) has met with less appreciation than it deserves.

J. C. G.

AUGUST, 1888.

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SELECT CASES

AND OTHER

AUTHORITIES ON THE LAW OF PROPERTY.

BOOK I.

DISTINCTION BETWEEN REAL AND PERSONAL PROPERTY.

BRACTON, Lib. 2, c. 9, fol. 27 a. If a gift be made for a term of years, although a very long one, which exceeds the lives of men, yet the donee will not have a freehold from it, since a term of years is certain and determined, and the term of life uncertain, and because although nothing is more certain than death, yet nothing is more uncertain than the hour of death.

WILLIAMS, REAL PROPERTY (18th ed.), 17, 25. Tenant for a term of years was regarded in early law as holding possession on behalf of the freeholder as his bailiff, and was never allowed to use the freeholder's remedies for dispossession. Originally he had no remedy in case of his ejectment, unless he held under a covenant with his landlord. If so, he might have an action of covenant against his landlord in case he had been ejected by the landlord himself or any one claiming the land by superior title; and might recover, in the former case, possession of his holding for the rest of his term, if unexpired, but otherwise damages only. But afterwards special actions were given to a tenant for years against any person, who had wrongfully ousted him or acquired possession of his land from a wrongful ejector. And though at first it was doubted whether these actions enabled him to recover anything but damages, in the reign of Edward the Fourth it was established that he should therein recover possession of his holding as well. The owner of chattels might take proceedings, under the early law, to obtain the restitution of stolen or lost goods, into whosoever hands they came; and in these proceedings he might either accuse the possessor of his goods of theft or sue him civilly, dropping the criminal charge. In the latter case, however, the plaintiff was obliged to set a money value on his goods, on payment of which the defendant would be absolved. But civil proceedings of this nature very soon became obsolete; when the dis-

2 DISTINCTION BETWEEN REAL AND PERSONAL PROPERTY.

possessed owner of goods was left to be protected by remedies, in which he could either make no claim but for compensation in money, or in which, though he might claim to recover his goods, the law gave no process, whereby the goods themselves could be attached and restored to him, and he could only recover their value if the defendant refused to render them. . . .

Originally, as we have seen, freeholds were the only things specifically recoverable in the King's Court; all that could be included in "the realty." Thus the word *realty* came to be used as denoting the freehold. After this, those interests in land which were reckoned as chattels were distinguished by the name of chattels *real*, because, it was said, they concerned the realty; while the name of chattels *personal* was given to movable goods, "because for the most part they belong to the person of a man, or else" (which seems the better reason) "for that they are to be recovered by personal actions." As freeholds descended to the heir, while chattels passed to the executor, the notion of descent to the heir became associated with the realty, as well as the idea of land specifically recoverable; and the incident of passing to the executor became a characteristic of the personalty. So that in later times, when men began to describe property as consisting of real and personal estate instead of by the old terms *lands, tenements, and hereditaments* and *goods and chattels*, only things inheritable as well as specifically recoverable, only *real hereditaments*, in fact, were classed as real estate; and chattels, whether real or personal, were considered as personal estate rather on the ground of their passing to the executor than with reference to the question, how far they were specifically recoverable.¹

2 BL. COM. 21. Incorporeal hereditaments are principally of ten sorts; advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities, and rents.²

LIT. § 740. But where such lease or grant is made to a man and to his heirs for terme of yeares, in this case the heire of the lessee or the grantee shall not after the death of the lessee or the grantee have that which is so let or granted, because it is a chattel real, and chattels realls by the common law shall come to the executors of the grantee, or of the lessee, and not to the heire.

¹ See also Digby, *Hist. Real Prop.* c. 3, sect. 2, § 17 (in 1st ed. § 16).

² "The next question was, whether the annuity of 500*l.* which in the will is called a freehold annuity [an annuity to the grantee and his heirs], and is thereby specifically given, is to be considered as real or personal; and upon the authority of the cases which were cited in the argument, viz., *The Earl of Stafford v. Buckley*, 2 Ves. Sen. 171, and *Aubin v. Daly*, 4 B. & Ald. 59, I am of opinion, that it is what Lord Hardwicke called a personal inheritance, which the law suffers to descend to the heir, but which has nothing to do with the realty." Per LORD LANGDALE, M. R., in *Radburn v. Jervis*, 3 Beav. 450, 461 (1841).

BLIGH v. BRENT.

EXCHEQUER. IN EQUITY. 1837.

[Reported 2 Y. & C. Ex. 268.¹]

ALDERSON, B., delivered the judgment of the court: This was a bill praying in substance that the defendant Margaret Brent, widow and executrix of Timothy Brent, deceased, may account for certain shares of the Chelsea Waterworks, and that it may be declared by the court that the plaintiff as his heir at law became entitled to those shares, and that the other defendants, the Governor and Company of the Chelsea Waterworks, may be directed to insert in their transfer-books the plaintiff's name as proprietor thereof. There is no dispute as to the facts, and the only question for the court was, whether these shares were part of the real or personal estate of the testator. If the former, the plaintiff as heir at law is entitled to the decree he prays, because the will is attested by only two witnesses; and if the latter, his bill must be dismissed.

When this question originally came before me, I thought it one of so much difficulty, and involving such extensive consequences, that I was desirous the parties should have the benefit of having the opinion of my learned brethren also; and accordingly, in conformity to the practice here (which is a peculiar advantage in the frame of the Court of Equity in the Exchequer), I adjourned the case to be heard before the full court. The case was, in the course of last Michaelmas Term, very fully and ably argued before Lord Abinger, my brothers Parke and Gurney, and myself; and I am now to deliver the opinion of the whole court on the point.

The company of the Chelsea Waterworks was originally constituted under the provisions of the statute 8 Geo. I., 1723. By that act, certain persons named therein were constituted commissioners, undertakers, and trustees for carrying into effect the works then projected, and for afterwards maintaining them. For that purpose his Majesty was, by a subsequent clause, empowered to incorporate them, by the name of the Governor and Company of the Chelsea Waterworks. And they were to have the power of purchasing lands not exceeding £1,000 per annum, and to sell and dispose thereof at their pleasure, and to do all necessary works, and to be subject to such rules, qualifications, and appointments as his Majesty should think reasonable to be inserted in the charter; and might also be empowered to make by-laws from time to time for the good government of the corporation.

In pursuance of this power a charter of incorporation was granted almost immediately afterwards by George I. That charter followed the directions of the statute, and gave the corporation power to purchase lands, &c., so as they did not exceed in value £1,000 per annum,

¹ The opinion only is given. It sufficiently states the facts.

and also estates for life or lives, and for years, and goods and chattels of what nature or value soever, for the better carrying on and effecting the purposes of the company, not exceeding the value of the joint stock of the corporation thereafter mentioned and limited, and to be taken and computed as part thereof.

The twenty-third section empowered the corporation by subscription to raise a joint stock, not exceeding £40,000, and to manage the same from time to time, and to receive the benefit and advantage of the same to the use of them the said Governor and Company and their successors, according to such shares and proportions as they or any of them have or shall have therein. And then it provided that every person subscribing and contributing any sum or sums of money should, by virtue thereof, become members of the said corporation, and should be entitled to a share or shares in such joint stock (previously fixed at £20 each) equal to the sum or sums of money so by him actually contributed and paid in, and no greater; and should be enabled to sell, assign, and transfer the same or any part thereof (not being less than one whole share, as by a subsequent clause was provided), by transfers in the company's books, in such manner as should be by a general court directed, or by his last will and testament; and the person to whom such assignment or transfer, or disposition by last will and testament, should be made, should by virtue thereof become member of the said corporation.

What, then, is the intention of the crown and legislature to be collected from all these particulars as to the nature of the interest which each shareholder is to have? That is, in truth, the whole question in this cause. Now, in the first place, we have a corporation to whose management the joint stock of money subscribed by its individual corporators is intrusted. They have power of vesting it at their pleasure in real estate or in personal estate, limited only as to amount, and of altering from time to time the species of property which they may choose to hold; and in order to give them greater facilities and advantages, certain powers are intrusted to the undertakers by the legislature, and that even before they were constituted a body corporate, of laying down pipes, and thereby occupying land for the purposes of their undertaking. These powers render the use of joint stock by the body corporate more profitable, but they form no part of the joint stock itself; and one decided test of this is, that they belong inalienably to the corporation, whereas all the joint stock is capable expressly of being sold, exchanged, varied, or disposed of at the pleasure of the corporate body. It is of the greatest importance to look carefully at the nature of the property originally intrusted, and that of the body to whose management it is intrusted, — the powers that body has over it, and the purposes for which these powers are given. The property is money, — the subscriptions of individual corporators. In order to make that profitable, it is intrusted to a corporation who have an unlimited power of converting part of it into land, part into goods, and of changing and dis-

posing of each from time to time; and the purpose of all this is the obtaining a clear surplus profit from the use and disposal of this capital for the individual contributors.

It is this surplus profit alone which is divisible among the individual corporators. The land or the chattels are only the instruments — and those varying and temporary instruments — whereby the joint stock of money is made to produce profit. Suppose the subscription had not been by the individual corporators, but that strangers, having collected the money, had put it into the management of a corporate body having particular privileges, and had, after giving them power to vest the money at their pleasure, stipulated to receive these profits: could it be contended that the nature of the property of the subscribers depended on the mode of management by the independent body? And yet that is, in truth, this case; for the individual members of a corporation are quite as distinct from the metaphysical body called “the corporation,” as any others of his Majesty’s subjects are.

This case varies most materially from those which were cited in the argument. In the *New River* case, the individual corporators have the property; the corporation have only the management of it. Lord Hardwicke, in the case in *Atkins*,¹ expressly puts it on that ground. “They have the legal right,” he says; “they may bring an ejectment for so much land covered with water; and the only difference between the shareholders of the king’s half and the others is that the corporation of management have as to these shares perhaps the legal estate in them, the equitable estate being in the individual proprietors.” In that case, too, the property given to the corporation was real property, which they are to manage for the good of all. They have no powers of converting it into any other sort of property, but must keep it and make a profit from it as it is; viz., as real property.

The same observations apply to *Buckeridge v. Ingram*,² the *Avon Navigation*, with this addition, that there the undertakers do not appear to have been a corporation at all. And in both the shares are transferred to the shareholders and their heirs. But here the case is wholly different, — the property intrusted is money; the corporation may do what they like with it, and may obtain their profit in any way they please from the employment of their capital stock. If they thought that they could with greater profit supply water by conveying it in carts or the like, they would have a perfect right so to do. It would be strange that the nature of these shares should continually fluctuate, and be sometimes real estate, and sometimes personal, according as the corporation in the course of their management should choose to hold real or personal property. Suppose a man made his will, attested by two persons, and at a time when the corporation held only personal estate. It is good. He becomes lunatic or is incapable from age, and then real property is bought by the corporation. Is his will to be set aside? And yet he cannot make another.

¹ [*Townsend v. Ash*, 3 Atk. 336.]

² [2 Ves. Jr. 652.]

Then, in what way has this property always been treated? If we look to the wording of the charter, the language is much more suitable to personal than to real estate. Indeed, on the latter supposition it is very inaccurate. Again, the form of transfer appointed by the legislature (for that which is done under the provisions of the charter is, in fact, done by the legislature, and is, indeed, subsequently recognized by it) is applicable to personal estate only. These shares are not transferred to A. B. and his heirs, but A. B., his executors, administrators, and assigns; and so they have always been. This form, indeed, may be considered as almost a contemporary exposition of the law on this point.

Lastly, in *Weekley v. Weekley*¹ this point came expressly under the consideration of Sir Thomas Sewell, Master of the Rolls, and he decided that these shares were personal property.

Upon the whole, therefore, we think that the principles of law, the usage of the company, and the distinct authority of one decided case are sufficient to warrant us in coming to the conclusion that these shares are personal property.

The result is, that the bill must be dismissed, with costs.

Decree accordingly.

Mr. Simpkinson, Mr. Creswell, and Mr. Toller, for the plaintiff.

The *Attorney-General* (*Sir John Campbell*), *Mr. Boteler*, and *Mr. Prescott White*, for the Governor and Company of the Chelsea Water-works.

Mr. G. Richards and *Mr. Stevens* for the defendant Brent.

¹ [2 Y. & C. Ex. 281, note.]

NOTE. — So *Russell v. Temple*, 3 Dane, Ab. 108. In Connecticut, shares in turn-pike corporations, and in Kentucky, shares in railroad corporations, were once held to be real estate; but in both States the law has now been changed by statute.

BOOK II.

NATURE AND ACQUISITION OF RIGHTS IN PERSONAL PROPERTY.

CHAPTER I.

INTRODUCTORY.

SUITS FOR THE RECOVERY OF PERSONAL PROPERTY.

NOTE. — The student cannot too soon observe the inseparable connection between substantive rights and the forms of remedies. In most suits which involve rights to personal property, only damages can be recovered. It seems desirable here to see when possession of the property itself may be obtained.

SECTION I.

DETINUE AND REPLEVIN.

PHILLIPS v. JONES.

QUEEN'S BENCH. 1850.

[Reported 15 Q. B. 859.]

PARKE, B.¹ We are of opinion that the judgment in the present form is erroneous. Upon referring to the precedents, it appears that the plaintiff in detinue has a right to recover the goods in specie, and, in case of non-delivery, the value, and the option of giving up the goods or paying the value is *in the defendant*, who, by refusing to deliver the former, renders himself liable to pay the latter. It was so laid down by Frowike, C. J., Keilw. Rep. 64 b. He says, "that the judgment is, that the plaintiff shall recover the goods or the value; then shall issue a writ to the sheriff to distrain the defendant to deliver the goods, and if he will not, then the value as it is taxed by the inquisition. And so

¹ A part only of the opinion is given.

it is in the election of the defendant to deliver to the plaintiff the goods or the value." And the same law is laid down in Yelv. 71; and in *Peters v. Heyward*, Cro. Jac. 682, it was held that the judgment must not give the sheriff an option to take one or the other, but the plaintiff must have judgment to recover the goods only, and, if they could not be had, the value. There appear to be two modes in the old books by which the value so to be recovered is to be ascertained; one, by which the value is found by the jury who try the issue, in giving the verdict: Rast. Ent. 218 b, Detinew, pl. 9, *Peters v. Heyward*, Cro. Jac. 682; and, if there were no issue to be tried, the jury who assess the damages would find the value: the other, according to which the sheriff is directed to ascertain the value [by writ of inquiry, according to the authorities cited], if the defendant does not deliver up the goods: Rast. Ent. Detinew, 218 a, pl. 4, 218 b, pl. 5, 219 b, pl. 13; and, on the sheriff's return, judgment absolute would be given for the value; *Palmer v. Hardyman*, Yelv. 71.

In the present case neither of these forms is adopted. The judgment does not ascertain the value, nor give any means of ascertaining it. The objection is the same as was held valid upon error in the last mentioned case.

MENNIE v. BLAKE.

QUEEN'S BENCH. 1856.

[Reported 6 E. & B. 842.]

REPLEVIN. Plea: *Non cepit*. Issue thereon.

The cause came on to be tried before Crowder, J., at the last Spring Assizes for Devon. The following account of the facts which then appeared in evidence is taken from the judgment of this court.

"One Facey was indebted to the plaintiff. He brought him £15 towards payment of the debt, but requested and obtained permission to lay the money out in the purchase of a horse and cart, which were to be the property of the plaintiff, but of which Facey was to have the possession and the use, subject to such occasional use as plaintiff might require to have of them, and to their being given up to plaintiff when he should demand them. Accordingly Facey made the purchase. The possession and the use were substantially with him; he fed, stabled, and took care of the horse; there was some evidence that his name was on the front of the cart; certainly plaintiff's was on the side, — under what circumstance placed there, the evidence was contradictory, the plaintiff alleging it to have been placed in the ordinary way as an evidence of property, the defendant insinuating that it was so placed in order to protect it from Facey's other creditors. It is not, however, material, because on the one hand the plaintiff's property we take to be indisputable, and on the other we do not think there is evidence enough

to charge the defendant with fraud or collusion in the circumstances under which he obtained possession, and which we now proceed to state.

“Facey determined to emigrate; and the defendant knew of his intention, but the plaintiff did not. The horse and cart were used in transporting Facey’s effects to the pier at which he was to embark; and the defendant, to whom he owed money for fodder supplied to the horse, went with him to procure payment if he could. At parting, Facey delivered the horse and cart to him, telling him to take them for the debt, but adding that he owed the plaintiff money also, and that if he would discharge the debt due to the defendant, which was much less than their value, he was to give them up to him. In this manner the defendant acquired his possession. The plaintiff for some time remained in ignorance of what had passed, and afterwards, coming to the knowledge of it, demanded them; but the defendant refused to deliver them unless his debt were paid: whereupon the plaintiff proceeded to replevy the goods, and so brought the present action.”

Upon these facts the learned judge directed a verdict for the plaintiff, with leave to move to enter a verdict for the defendant, or a nonsuit if under such circumstances replevin did not lie.

Montague Smith, in the ensuing term, obtained a rule *nisi* accordingly.

Collier and *Karslake*, in last Hilary Term, showed cause.

Montague Smith and *Coleridge*, contra.

COLERIDGE, J., now delivered judgment. This was a rule to enter a nonsuit or verdict for the plaintiff on a plea of *Non cepit* to a declaration in replevin; and the facts were in substance these. His Lordship then stated the facts, and proceeded as follows:—

Upon these facts the question raised is, Whether there was any taking of the horse and cart from the plaintiff by the defendant? And we are of opinion, looking to the nature and purpose of the action of replevin, that there was no taking in the sense in which that word must be understood in this issue. The whole proceeding of replevin, at common law, is distinguished from that in trespass in this, among other things: that, while the latter is intended to procure a compensation in damages for goods wrongfully taken out of the actual or constructive possession of the plaintiff, the object of the former is to procure the restitution of the goods themselves; and this it effects by a preliminary *ex parte* interference by the officer of the law with the possession. This being done, the action of replevin, apart from the replevin itself, is again distinguished from trespass by this, that, at the time of declaring, the supposed wrongful possession has been put an end to, and the litigation proceeds for the purpose of deciding whether he, who by the supposition was originally possessed, and out of whose possession the goods were taken, and to whom they have been restored, ought to retain that possession, or whether it ought to be restored to the defendant. Blackstone (3 Com. 146), after observing that the Mirror

ascribes the invention of this proceeding to Glanvil, says that it "obtains only in one instance of an unlawful taking, that of a wrongful distress." If by this expression he only meant that in practice it was not usual to have recourse to replevin except in the case of a distress alleged to be wrongful, he was probably justified by the fact. But there are not wanting authorities to show that the remedy by replevin was not so confined; and in the case of *Shannon v. Shannon*, 1 Sch. & Lef. 324, 327, Lord Redesdale finds fault with this passage, saying that the definition is "too narrow," and that "many old authorities will be found in the books of replevin being brought where there was no distress:" and the learned reporters, in a note to the passage, refer to Spelman's Glossary, 485 (tit. *Replegio*); *Doctrina Placitandi*, Replevin, 313; Com. Dig. Replevin (A); and Gilbert, Distress and Replevin, 58 (4th ed., p. 80).

There is no doubt that passages, such as those referred to, may be found stating the definition very broadly; yet we believe that when the authorities on which some of them rest are examined, and when due attention has been paid to the context in others, it will appear in the result questionable, at the least, whether the commentator's more qualified definition was not correct, — at least that replevin was instituted as a peculiar remedy, and under the Statute of Marlbridge by plaint as a *festinum remedium* for the injury of an unlawful distress.

Thus in 2 Roll. Abr. 430, Replevin (B) 2, it is said, if trespasser takes beasts, replevin lies of this taking at election; the authority for this is Yearb. Mich. 7 H. IV. fol. 28 B, where, the counsel or another judge alleging the contrary, Gascoigne, C. J. of K. B., says: "He may elect to have replevin or writ of trespass;" but he adds, or the reporter adds, "and some understand that he cannot," — for which last a reason is given.

Again, Com. Dig. Replevin (A): "Replevin lies of all goods and chattels unlawfully taken." For this no authority is cited; but the context shows that the Chief Baron was thinking, not so much of the circumstances under which taken, as of the things themselves, for he adds, "whether they be live cattle or dead chattels," or "a swarm of bees," or "iron of his mill," citing Fitzherbert's *Natura Brevium*, in whose chapter on Replevin we do not find the law so broadly laid down. As to the passage to which reference is made in Lord Chief Baron Gilbert, it should be remembered that the treatise is on the Law of Distresses and Replevins, and the passage occurs in a chapter in which replevin is treated of with reference to distress, as if the two formed parts of one subject-matter. Little, therefore, can be inferred from the generality of the language in a single sentence. A *dictum* of Lord Ellenborough has also been referred to in *Dore v. Wilkinson*, 2 Stark. N. P. C. 287, from which the inference is that he thought replevin might conveniently be had recourse to more often than it was, instead of bringing trover; but it was an observation thrown out in the course of a cause, a recollection of what Mr. Wallace used to say,

not ruling any point, nor deciding anything, in the cause. Much importance ought not to be attached to such casual observations, even of so great a judge at Nisi Prius. On the other hand, Lord Coke seems to be authority the other way. In Co. Lit. 145 b, is the following passage: "A *replegiare* lyeth, as Littleton here teacheth us, *where goods are distrained and impounded*; the owner of the goods may have a writ *de replegiari facias*, whereby the sheriff is commanded, taking sureties in that behalf, to re-deliver the goods distrained to the owner, or upon complaint made to the sheriff he ought to make a replevy in the county. *Replegiare* is compounded of *re* and *plegiare*; as much as to say, as to re-deliver upon pledges or sureties."

From a review of these and other authorities which might be added, it may appear not settled whether originally a replevy lay in case of other takings than by distress. Nor is it necessary to decide that question now; for at all events it seems clear that replevin is not maintainable unless in a case in which there has been first a taking out of the possession of the owner. This stands upon authority and the reason of the thing. We have referred already to a *dictum* of Lord Redesdale. Three cases are to be found: *Ex parte Chamberlain*, 1 Sch. & Lef. 320; *In Re Wilsons*, 1 Sch. & Lef. 320, note (a); and *Shannon v. Shannon*, 1 Sch. & Lef. 324, in which the law is so laid down by Lord Redesdale. And these are cases of great authority; for that very learned judge found the practice in Ireland the other way. He felt the inconvenience and injustice of it; he consulted with the Lord Chief Justice, and obtained the opinion of the other judges; and then pronounced the true rule, which, in one of these cases, *In Re Wilsons*, he thus states: The writ of replevin "is merely meant to apply to this case, viz., where A takes goods wrongfully from B, and B applies to have them re-delivered to him upon giving security until it shall appear whether A has taken them rightfully. But if A be in possession of goods in which B claims a property, this is not the writ to try that right." In the course of these cases his Lordship points out how replevin proceeds against the general presumption of law in favor of possession; how it casts upon him who was in possession the burden of first proving his right; and he puts (*Ex parte Chamberlain*, 1 Sch. & Lef. 322), as a *reductio ad absurdum*, a case not unlike the present. "Suppose," says he, "the case of a person having a lien on goods in his possession, and who insists on being paid before he delivers them up: I do not see, *on the principles insisted on*, why a writ of replevin may not issue in that case." The reason of the thing is equally decisive: as a general rule it is just that a party in the peaceable possession of land or goods should remain undisturbed, either by the party claiming adversely or by the officers of the law, until the right be determined and the possession shown to be unlawful. But where, either by distress or merely by a strong hand, the peaceable possession has been disturbed, an exceptional case arises; and it may be just that, even before any determination of the right, the law should

interpose to replace the parties in the condition in which they were before the act done, security being taken that the right shall be tried and the goods be forthcoming to abide the decision. Whatever may be thought of Lord Coke's etymology, what he says of *replegiare*, while it shows his understanding of the law, gives a true account of what replevin is, — a re-delivery to the former possessor on pledges found. But this is applicable clearly to exceptional cases only. If wherever a party asserts a right to goods in the peaceable possession of another he has an election to take them from him by a replevin, it is obvious that the most crying injustice might not unfrequently result. Now, in the present case Facey was not the servant of the plaintiff, nor was his possession merely the possession of the plaintiff; he was the bailee of the plaintiff, and had a lawful possession from the delivery of the owner, which conferred on him a special property. This did not authorize him to transfer his possession to the defendant, nor could he give him a lien for his debt against the paramount right of the true owner, the bailor. After a demand and refusal, upon the admitted facts in this case, the plaintiff could clearly have maintained trover against the defendant; but yet there was nothing wrongful in his accepting the possession from Facey. He acquired that possession neither by fraud nor violence, — at least none is found, and we cannot presume either, — and he retained the possession on a ground which might justify the retainer until the alleged ownership was proved. This, therefore, in our opinion was a case in which the plaintiff could not proceed by replevin, but should have proved his prior right in trover or detinue.

It appeared in this case that the sheriff's deputy for the issuing of replevins was the attorney for the plaintiff; and although we have no reason to believe that anything wrong was *here* intended, we think it right to notice this circumstance, because it is one which obviously might lead to much abuse and oppression. It is proper to be known that there are several cases to be found in the books in which attachments have issued where replevins have been thought to have been granted improperly and from improper motives.

The rule should be absolute, not to enter a verdict, but a nonsuit.

*Rule absolute for a nonsuit.*¹

¹ In *Mellor v. Leather*, 1 E. & B. 619 (1853), it had been said by the Court of Queen's Bench that replevin would lie where goods had been unlawfully taken, though not as a distress.

STOUGHTON v. RAPPALO.

SUPREME COURT OF PENNSYLVANIA. 1818.

[Reported 3 S. & R. 559.]

THIS was a replevin for 631 barrels of flour, tried before the Chief Justice, at Nisi Prius, in November, 1817, when the jury found a verdict for the plaintiff, subject to the opinion of the court in banc on a point reserved.

The plaintiff, on March 9th, 1813, contracted to ship 631 barrels of flour on board the *Minerva*, a Spanish vessel, of which the defendant was master, from Philadelphia to Havanna, at four dollars a barrel. The flour was accordingly put on board by March 16th, the ship then lying at the wharf in Philadelphia. On March 16th the bills of lading were signed, and the ship cleared out at the custom-house; and on the 17th she cleared out at the Spanish consul's. When the contract was made, both parties expected a blockade of the Delaware by the British, and, accordingly, notice was received in Philadelphia on March 16th that the blockade was instituted. Under these circumstances the plaintiff several times applied to the defendant either to proceed on his voyage, or to deliver up the flour; and the defendant, on the last application, refused to do either, unless the plaintiff, in case of the flour being delivered to him, would pay one half freight (two dollars a barrel), or, in case the vessel proceeded, would guarantee the ship and two thirds of the freight. The plaintiff, therefore, on April 29th, issued this replevin, on which the flour was delivered to him.

The defendant pleaded property, on which issue was joined, and a verdict taken for six cents damages and six cents costs, subject to the opinion of the court whether the property at the commencement of the action was in the plaintiff.

Chauncey and *Ingersoll* for the defendant.

J. R. Ingersoll, contra.

DUNCAN, J. However the law may be in England as to the action of replevin, whether it only lies in case of distress, as is held by some (3 Bl. 145), or whether, as held by others, it lies in all cases where the goods have been taken out of the actual possession of the owner, it is the established law of Pennsylvania that it lies in all cases where a man claims goods in the possession of another. 1 Dall. 156. 6 Binn. 8. It is a question of property. It is not like trover, which is an equitable action, and if the party has a legal or equitable lien on the property, it may be defalked in the damages assessed by the jury. But in a case where the claim of the defendant must be entirely uncertain, no fixed standard by which to ascertain it, the owner cannot know what sum to tender; and if a verdict passed against him in replevin, because he tendered too little, his property would be lost. Here the goods were delivered to the plaintiff. If there is a verdict for the defendant, it

must be a general one; in which case there would be judgment *de retorno habendo*, and the defendant might, for the value of the goods, and not for the amount of the lien claimed by him, proceed against the sheriff or the pledges. In the action the jury could not award damages to the defendant.

The taking here not being tortious, the plaintiff must prove property. If the taking were wrongful, this burden would lie on the defendant. The plaintiff has proved property. The defendant cannot claim a lien on the ground of freight, for no freight was earned; and it is impossible to say certainly that it would have been earned, had there been no blockade, for still the voyage might not have been safely performed. The plaintiff had done everything on his part. The defendant was not prevented from earning it by any breach of contract on the part of the plaintiff.

It is not necessary, as this case comes before the court, to decide whether the defendants were entitled to any compensation, and if to any, what. The occasion does not call for an opinion on the question whether the contract is dissolved or suspended. Although no direct decision has been produced, yet it appears from writers whose opinions are entitled to great respect, and such, too, would appear to be the reason of the thing, independently of direct precedents, that in case of a cargo such as this, perishable in its nature, which if kept on board during the continuance of the blockade would have been spoiled, or if secured on shore must be greatly deteriorated, that the owner had a right to have such cargo unladen, and to the possession of it, and the power to sell it, without giving any security to replace it. If this be so, the defendant could have no lien on the cargo. For the doctrine of lien is founded on the possessor's right to detain until the lien is discharged. When the possession is gone, the lien is gone. The remedy of the defendant for compensation, if he has any, is not by detaining the goods, nor action for recovery of freight, but an action for the recovery of damages for not being suffered to carry it.¹

New trial refused.

SECTION II.

BILL IN EQUITY.

SOMERSET v. COOKSON.

IN CHANCERY, BEFORE LORD TALBOT, C. 1735.

[*Reported 3 P. Wms. 390.*]

THE Duke of Somerset, as lord of the manor of Corbridge, in Northumberland (part of the estate of the Piercys, late Earls of Northumber-

¹ The opinions of the other judges concurring are omitted. For the States which give the same scope to the action, see *Morris, Replevin* (3d ed.), 52-54. See also *Wilson v. Fuller*, 9 Kan. 176, 190 (1872).

land), was entitled to an old altar-piece made of silver, remarkable for a Greek inscription and dedication to Hercules. His grace became entitled to it as treasure-trove within his said manor. This altar-piece had been sold by one who had got the possession of it to the defendant, a goldsmith at Newcastle, but who had notice of the Duke's claim thereto. The Duke brought a bill in equity to compel the delivery of this altar-piece in specie, undefaced.

The defendant demurred as to part of the bill, for that the plaintiff had his remedy at law by an action of trover or detinue, and ought not to bring his bill in equity; that it was true, for writings savoring of the realty a bill would lie,¹ but not for anything merely personal, any more than it would for an horse or a cow. So a bill might lie for an heirloom, as in the case of *Pusey v. Pusey*, 1 Vern. 273. And though in trover the plaintiff could have only damages, yet in detinue the thing itself, if it can be found, is to be recovered; and if such bills as the present were to be allowed, half the actions of trover would be turned into bills in chancery.

On the other side it was urged that the thing here sued for was matter of curiosity and antiquity; and though at law only the intrinsic value is to be recovered, yet it would be very hard that one who comes by such a piece of antiquity by wrong, or it may be as a trespasser, should have it in his power to keep the thing, paying only the intrinsic value of it, — which is like a trespasser's forcing the right owner to part with a curiosity or matter of antiquity or ornament, *volens volens*. Besides, the bill is to prevent the defendant from defacing the altar-piece, which is one way of depreciating it; and the defacing may be with an intention that it may not be known, by taking out or erasing some of the marks and figures of it. And though the answer had denied the defacing of the altar-piece, yet such answer could not help the demurrer. That in itself nothing can be more reasonable than that the man who by wrong detains my property, should be compelled to restore it to me again in specie; and the law being defective in this particular, such defect is properly supplied in equity.

Wherefore it was prayed that the demurrer might be overruled, and it was overruled accordingly.

¹ See *Pierce v. Lamson*, 5 Allen, 60. — Ed.

CHAPTER II.

ACQUISITION OF RIGHTS NOT UNDER FORMER OWNER.

NOTE. — In this chapter are considered the cases in which the chattel in question either had no former owner, or in which, if it had a former owner, the present claimant does not derive his title from him.

SECTION I.

CHATTELS HAVING NO FORMER OWNER.

(*Inst.* II. 1, 12, 13 & 15.)

12. WILD beasts, therefore, and birds and fishes, that is to say, all animals that live on the earth, in the sea or in the air, as soon as they are caught by any one, become his at once by virtue of the law of nations. For whatever has previously belonged to no one, is granted by natural reason to the first taker. Nor does it matter whether a man catches the wild beasts or birds on his own ground, or on another's; although a person purposing to enter on another's land for the purpose of hunting or fowling may of course be prohibited from entering by the owner, if he perceive him. Whatever, then, you have caught of this kind, is regarded as yours so long as it is kept in your custody; but when it has escaped from your custody and reverted to its natural freedom, it ceases to be yours, and again belongs to the first taker. And it is considered to have recovered its natural freedom when it has either escaped out of your sight, or is still in sight, but so situated that its pursuit is difficult.¹

13. It has been debated whether a wild beast is to be considered yours at once, if wounded in such manner as to be capable of capture; and some have held that it is yours at once, and is to be regarded as yours so long as you are pursuing it, but that if you desist from pursuit, it ceases to be yours, and again belongs to the first taker. Others have thought that it is not yours until you have actually caught it. And we adopt the latter opinion, because many things may happen to prevent your catching it.

15. . . . But, with respect to animals which are in the habit of going and returning, the rule has been adopted, that they are considered yours as long as they have the intention of returning, but if they cease to have this intention, they cease to be yours, and become the property of the first person that takes them. These animals are supposed to have lost the intention, when they have lost the habit, of returning.²

¹ See *Manning v. Mitcherson*, 69 Ga. 447 (1882); *Mullett v. Brayne*, 53 N. Y. Sapp. 781 (1898); Report Royal Com. on Crim. Code, p. 26. See also *Haslem v. Lockwood*, 37 Conn. 500. — Ed.

² See *Behring Sea Arbitration*, 1 Moore, Int. Arbs. 881, 917, 918.

THE CASE OF SWANS.

7 Co. 15 b, 17 a (1592). — And in the same case it is said that the truth of the matter was that the Lord Strange had certain swans which were cocks, and Sir John Charleton certain swans which were hens, and they had cignets between them; and for these cignets the owners did join in one action, for in such case by the general custom of the realm, which is the common law in such case, the cignets do belong to both the owners in common equally, *sc.* to the owner of the cock and the owner of the hen; and the cignets shall be divided betwixt them. And the law thereof is founded on a reason in nature; for the cock swan is an emblem or representation of an affectionate and true husband to his wife above all other fowls; for the cock swan holdeth himself to one female only, and for this cause nature hath conferred on him a gift beyond all others; that is, to die so joyfully, that he sings sweetly when he dies; upon which the poet saith, —

Dulcia defecta modulatur carmina lingua,
Cantator, cygnus, funeris ipse sui, etc.

And therefore this case of the swan doth differ from the case of kine, or other brute beasts. *Vide* 7 Hen. IV. 9.¹

YOUNG v. HICHENS.

QUEEN'S BENCH. 1844.

[Reported 6 Q. B. 606.]

TRESPASS. — The first count charged that defendant, with force, &c., seized and disturbed a fishing sear and net of plaintiff, thrown into the sea for fish, wherein plaintiff had taken and inclosed, and then held inclosed in his own possession, a large number of fish, to wit, &c., and that defendant threw another fishing sear and net within and upon plaintiff's sear and net, and for a long time, to wit, &c., prevented plaintiff from taking the fish, so taken and inclosed, out of his sear and net, as he could otherwise have done; and drove, &c., the fish; whereby part of them died, part were injured, and part escaped; and the sear and net was injured. Second count, that defendant with force, &c., seized, took, and converted fish of plaintiff.

Pleas. 1. Not guilty. Issue thereon.

2. To the first count, as to preventing plaintiff from taking the fish alleged to be inclosed in his possession, and driving, &c., the said fish: that the fish were not plaintiff's fish, and he was not possessed of them, in manner, &c. Conclusion to the country. Issue thereon.

¹ See *Tyson v. Simpson*, 2 Hayw. (No. Ca.) 147. — ED.

3. To the second count, that the fish were not the plaintiff's fish, in manner, &c.: conclusion to the country. Issue thereon.

4 and 5. As to other parts of the declaration, raising defences under statutes 16 Geo. III. c. 36, and 4 & 5 Vict. c. lvii. (local and personal, public), relating to the St. Ives (Cornwall) pilchard fishery. Issues of fact were tendered and joined on those pleas.

On the trial, before Atcherley, Serjt., at the Cornwall Spring Assizes, 1843, it appeared that the plaintiff had drawn his net partially round the fish in question, leaving a space of about seven fathoms open, which he was about to close with a stop net; that two boats, belonging to the plaintiff, were stationed at the opening, and splashing the water about, for the purpose of terrifying the fish from passing through the opening; and that at this time the defendant rowed his boat up to the opening, and the disturbance, and taking of the fish, complained of, took place. The learned Serjeant left to the jury the question of fact whether the fish were at that time in the plaintiff's possession, and also other questions of fact on the other issues. Verdict for plaintiff on all the issues, with damages separately assessed; namely, £568 for the value of the fish, and £1 for the damage done to the net. Leave was given to move as after mentioned. In Easter term, 1843, Crowder obtained a rule *nisi* for entering a verdict for defendant on all the issues, or on the 2nd, 3rd, 4th, and 5th, or for reducing the damages to 20s. and entering a verdict for defendant on the 2nd and 3rd issues; or for a new trial; or for arresting the judgment. In Hilary vacation (Feb. 10th), 1844,

Cockburn and Montague Smith showed cause.

Crowder, contra.

LORD DENMAN, C. J. It does appear almost certain that the plaintiff would have had possession of the fish but for the act of the defendant; but it is quite certain that he had not possession. Whatever interpretation may be put upon such terms as "custody" and "possession," the question will be whether any custody or possession has been obtained here. I think it is impossible to say that it had, until the party had actual power over the fish. It may be that the defendant acted unjustifiably in preventing the plaintiff from obtaining such power; but that would only show a wrongful act, for which he might be liable in a proper form of action.

PATTESON, J. I do not see how we could support the affirmative of these issues upon the present evidence, unless we were prepared to hold that all but reducing into possession is the same as reducing into possession. Whether the plaintiff has any cause of action at all is not clear; possibly there may be a remedy under the statutes.

WIGHTMAN, J. I am of the same opinion. If the property in the fish was vested in the plaintiff by his partially inclosing them, but leaving an opening in the nets, he would be entitled to maintain trover for fish which escaped through that very opening.

(COLERIDGE, J., was absent.)

Rule absolute for reducing the damages to 20s., and entering the verdict for defendant on the second and third issues.

BUSTER v. NEWKIRK.

SUPREME COURT OF NEW YORK. 1822.

[Reported 20 Johns. 75.]

IN ERROR, on *certiorari* to a justice's court.

Newkirk brought an action of trover against Buster for a deer skin. It appeared that N. was hunting deer on the 31st of December, 1819, and had wounded one, about six miles from B.'s house, which he pursued with his dogs. He followed the track of the deer, occasionally discovering blood, until night; and on the next morning resumed the pursuit, until he came to B.'s house, where the deer had been killed the evening before. The deer had been fired at by another person, just before he was killed by B., and fell, but rose again, and ran on, the dogs being in pursuit, and the plaintiff's dog laid hold of the deer about the same time, when B. cut the deer's throat. N. demanded the venison and skin of B., who gave him the venison, but refused to let him have the skin. The jury found a verdict for the plaintiff for seventy-five cents, on which the justice gave judgment.

PER CURIAM: The principles decided in the case of *Pierson v. Post* (3 Caines' Rep. 175) are applicable here. The authorities cited in that case establish the position that property can be acquired in animals *feræ naturæ* by *occupancy* only, and that in order to constitute such an occupancy it is sufficient if the animal is deprived of his natural liberty, by wounding or otherwise, so that he is brought within the power and control of the pursuer. In the present case the deer, though wounded, ran six miles; and the defendant in error had abandoned the pursuit that day, and the deer was not deprived of his natural liberty, so as to be in the power or under the control of N. He therefore cannot be said to have had a property in the animal so as to maintain the action. The judgment must be reversed.

Judgment reversed.

SWIFT v. GIFFORD.

UNITED STATES DISTRICT COURT FOR MASSACHUSETTS. 1872.

[Reported 2 Lowell, 110.]

LIBEL by the owners of the ship *Hercules* against the agent and managing owner of the *Rainbow*, both whale-ships of New Bedford, for the value of a whale killed in the Ochotsk Sea by the boats of the *Hercules*, and claimed by the master of the *Rainbow*, and taken and

appropriated by him, because one of his harpoons, with a line attached to it, was found fastened in the animal when he was killed. The evidence tended to show that the boats of the respondents raised and made fast to the whale, but he escaped, dragging the iron and line, and so far outran his pursuers that the boats' crews of the *Hercules* did not know that any one had attacked or was pursuing the whale when they, being to windward, met and captured him; that the master of the *Rainbow* was, in fact, pursuing, and came up before the whale had rolled over, and said that one of his irons would be found in it, which proved to be true; and he thereupon took the prize. The parties filed a written stipulation that witnesses of competent experience would testify that, during the whole time of memory of the oldest masters of whaling-ships, the usage had been uniform in the whale-fishery of Nantucket and New Bedford that a whale belonged to the vessel whose iron first remained in it, provided claim was made before cutting in. There were witnesses on the stand who confirmed the existence of the usage, and who extended it to all whalemén in these seas; and there was nothing offered to oppose this testimony. The only disputed question of fact or opinion was concerning the reasonable probability that the whale would have been captured by the *Rainbow* if the boats of the *Hercules* had not come up. The value of the whale was said to be about \$3,000.

J. C. Dodge and *C. T. Bonney*, for the libellants.

G. Marston and *W. W. Crapo*, for the respondent.

LOWELL, J.: The rule of the common law, borrowed probably from the Roman law, is that the property in a wild animal is not acquired by wounding him, but that nothing short of actual and complete possession will avail. This is recognized in all the cases concerning whales cited at the Bar, as well as in the authorities given under the first point. Whether the modern civil law has introduced the modification that a fresh pursuit with reasonable prospect of success shall give title to the pursuer, does not seem to be wholly free from doubt, though the ancient commentators rejected such a distinction, for the satisfactory reason that it would only introduce uncertainty and confusion into a rule that ought to be clear and unmistakable. See *Pandects*, by Pothier, vol. xvi. p. 550; lib. 41, tit. 1; *Gaius*, by *Tompkins & Lemon*, p. 270. I do not follow up this inquiry, because it would be impossible for me to say that the crew represented by the respondent, though continuing the chase, had more than a possibility of success.

The decision, therefore, must turn on the validity of the usage, without regard to the chances of success which the respondent's crew had when the others came up. It is not disputed that the whalemén of this State, who have for many years past formed, I suppose, a very large proportion of all those who follow this dangerous trade in the Arctic seas, and perhaps all other Americans, have for a very long time recognized a custom by which the iron holds the whale, as they express it.

The converse of the proposition is that a whale which is found adrift, though with an iron in it, belongs to the finder, if it can be cut in before demand made. The usage of the English and Scotch whalers in the Northern fishery, as shown by the cases, is, that the iron holds the whale only while the line remains fast to the boat; and the result is, that every loose whale, dead or alive, belongs to the finder or taker, if there be but one such.

The validity of the usage is denied by the libellants, as overturning a plain and well-settled rule of property. The cases cited in the argument prove a growing disposition on the part of the courts to reject local usages when they tend to control or vary an explicit contract or a fixed rule of law. Thus Story, J., in *The Reeside*, 2 Sumner, 569, says, "I own myself no friend to the almost indiscriminate habit of late years of setting up particular usages or customs in almost all kinds of business and trade, to control, vary, or annul the general liabilities of parties under the common law, as well as the commercial law. It has long appeared to me that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and liable to great misunderstandings and misinterpretations and abuses, to outweigh the well-known and well-settled principles of law." Many similar remarks of eminent judges might be cited. But in the application of these general views it will be found difficult to ascertain what is considered a principle of law that cannot be interfered with. Principles of law differ in their importance as well as in their origin; and while some of them represent great rules of policy, and are beyond the reach of convention, others may be changed by parties who choose to contract upon a different footing; and some of them may be varied by usage, which, if general and long established, is equivalent to a contract. Thus in *Wigglesworth v. Dallison*, Doug. 201, which Mr. Smith has selected as a leading case, the law gave the crops of an outgoing tenant to his landlord; but the custom which made them the property of the tenant was held to be valid.

The rule of law invoked in this case is one of very limited application. The whale-fishery is the only branch of industry of any importance in which it is likely to be much used; and if a usage is found to prevail generally in that business, it will not be open to the objection that it is likely to disturb the general understanding of mankind by the interposition of an arbitrary exception. Then the application of the rule of law itself is very difficult, and the necessity for greater precision is apparent. Suppose two or three boats from different ships make fast to a whale, how is it to be decided which was the first to kill it? Every judge who has dealt with this subject has felt the importance of upholding all reasonable usages of the fishermen, in order to prevent dangerous quarrels in the division of their spoils. In *Fennings v. Grenville*, 1 Taunt. 241, evidence was offered of a custom in the Southern fishery for the contending ships to divide the whale equally between

them. This custom, which differed entirely from that prevailing in the North Atlantic, was yet thought to be not unreasonable. *Chambre, J.*, said, "I remember the first case on the usage which was had before Lord Mansfield, who was clear that every person was bound by it, and who said that were it not for such a custom there would be a sort of warfare perpetually subsisting between the adventurers." The case went off upon a question of pleading, and the custom was not passed upon; but it is clear that it was thought to be valid. In the other cases cited, the usage first above mentioned was found to be valid. In the case of *Bartlett v. Budd*, 1 Lowell, 223, the respondents claimed title to a whale by reason of having found it, though it had been not only killed, but carefully anchored, by the libellants. I there intimated a doubt of the reasonableness of a usage in favor of the larceny of a whale under such circumstances, and I still think that some parts of the asserted usage could hardly be maintained. If it were proved that one vessel had become fully possessed of a whale, and had afterwards lost or left it, with a reasonable hope of recovery, it would seem unreasonable that the finder should acquire the title merely because he is able to cut in the animal before it is reclaimed. And, on the other hand, it would be difficult to admit that the mere presence of an iron should be full evidence of property, no matter when or under what circumstances it may have been affixed. But the usage being divisible in its nature, it seems to me that, so far as it relates to the conduct of the men of different vessels in actual pursuit of a whale, and prescribes that he who first strikes it so effectually that the iron remains fast should have the better right, the pursuit still continuing, it is reasonable, though merely conventional, and ought to be upheld. In *Bourne v. Ashley*, determined in June, 1863, but not printed, Judge Sprague, whose experience in this class of cases was very great, found the custom to be established, and decided the cause in favor of the libellants, because they owned the first iron, though the whale was killed by the crew of the other vessel, or by those of both together. Mr. Stetson, of counsel in that case, has kindly furnished me with a note of the opinion taken down by him at the time, and I have carefully compared it with the pleadings and depositions on file, and am satisfied that the precise point was in judgment. The learned judge is reported to have said that the usage for the first iron, whether attached to the boat or not, to hold the whale, was fully established, and that one witness carried it back to the year 1800. He added, that although local usages of a particular port ought not to be allowed to set aside the general maritime law, this objection did not apply to a custom which embraced an entire business, and had been concurred in for a long time by every one engaged in that trade.

In this case the parties all understood the custom, and the libellants' master yielded the whale in conformity to it. If the pursuit of the *Rainbow* had been clearly understood in the beginning, no doubt the other vessel would not have taken the trouble to join in it, and

the usage would have had its appropriate and beneficial effect. In the actual circumstances, it is a hard case for the libellants; but as they have not sustained their title, I must dismiss their cause, and, in consideration of the point being an old one in this court, with costs.

Libel dismissed, with costs.

SECTION II.

WRECK.

MURPHY v. DUNHAM.

U. S. DISTRICT COURT, E. D. MICHIGAN. 1889.

[*Reported 38 Fed. Rep. 503.*]

LIBEL¹ in admiralty for the conversion of 981 tons of coal. Respondent was owner of the schooner Wells Burt, carrying 1375 tons of coal from Buffalo, consigned to Chicago. On May 18, 1883, the vessel anchored off Evanston, Illinois, and sunk at her anchorage, in a storm, with all on board, neither man nor animal surviving. The whereabouts of the schooner were wholly unknown. Both respondent and the consignees of the cargo abandoned their interests to the underwriters as a total loss. Afterwards the underwriters of the cargo made a sale of the cargo to the libellant Murphy. Some two months after the loss, the schooner was located by the libellant and the respondent, independently of one another. Libellant's diver reported that the expense of raising the cargo would exceed its value. No attempt was made to raise the schooner. In January, 1884, the respondent notified the underwriters and the libellant, that he intended to raise the vessel, and that, unless he heard to the contrary from the libellant, respondent should consider that libellant abandoned the cargo. To this libellant replied that he neither had abandoned nor intended to abandon his interest, and that he had already begun preparations for rescuing the schooner and cargo. In June, 1884, the respondent, without any license from libellant or the underwriters, raised 981 tons of coal from the schooner, which he sold in open market. The consignee, on notice of the arrival of the cargo in Chicago, refused to receive the same and pay the charges, declaring that he had been paid by the underwriters. Murphy was informed of the respondent's operations during their progress, but he made no claim for the coal till May, 1885, when this suit was brought.

BROWN, J. By the common law of England it would appear that property found floating at sea, by which we mean more than a marine league from the shore, belonged to the finder. Thus, Britton says

¹ The statement of facts is abbreviated. Part of the opinion is omitted.

(lib. 1, c. 17) : "Of treasure hid in the ground, the king will have it, and if it be found in the sea, be it to the finder." And, again: "If found on the shore, they (the shipwrecked goods) are a wreck and belong to the king; but if they are found in the sea further off from the shore, then whatever has been found shall belong to the finder, because it may be said to be then no man's goods;¹ the king no more than a private person." By the statute (3 Edw. I. c. 4) known as the "Statute of Westminster," it is provided, that, "concerning wrecks of the sea, it is agreed that where a man, a dog, or a cat escape quick out of the ship, that such ship, nor barge, nor anything within them shall be adjudged wreck, but the goods shall be saved and kept by view of the sheriff, coroner, or king's bailiff, and delivered into the hands of such as are of the town where the goods are found; so that if any sue for those goods, and after proof that they were his, or perished in his keeping, within a year and a day, they shall be restored to him without delay; and if not, they shall remain to the king, and be seized by the sheriffs, coroners, and bailiffs, and shall be delivered to them of the town, which shall answer before the justices of the wreck belonging to the king. And, where the wreck belongeth to another than the king, he shall have it in like manner." It is upon this statute, which is assumed to be a part of the common law of this country, that defendant relies for his claim that the libellant lost his property in the coal in question by reason of his failure to appear within a year and a day to make claim to it. The statute, however, seems to be merely declaratory of the common law, and the fact that no dog, nor cat, nor other animal came alive ashore, did not by any means prove that the goods were a wreck, or forfeited. *Hamilton v. Davis*, 5 Burrows, 2732, 2738. It was said in that case that "if the owner of the dog or cat or other animal was known, the presumption of the goods belonging to the same person would be equally strong, whether the animal was alive or dead. If no owner could be discovered, the goods belonged to the king. But there ought to be a reasonable time allowed to the owner to come in and claim them." "The old limitation was a year and a day, which was the time limited in many other cases." The only significance of the dog or cat was in raising a presumption (which seems somewhat far fetched) towards ascertaining the owner of the goods. At any rate the modern system of marking goods has completely supplanted this primitive and inconclusive proof.

But I think this statute has no application to the case under consideration for two reasons:

First. The coal lying at the bottom of the lake was not by the common law wreck of the sea. Lord Hale in his treatise *De Jure Maris*, 37, speaking of wreck, says: "The kinds of it are two: First, such as is called properly so, the goods cast upon the land or shore; second, improper, for goods that are a kind of sea waifs or stray; flotsam, jetsam and ligam." This coal had never been cast upon the land or shore,

¹ But see *The King v. Property Derelict*, 1 Hagg. (Adm.) 383. — Ed.

and hence was not wreck proper. It was not flotsam, because it did not float upon the water. It was not jetsam, because it never had been cast into the sea to save the ship; nor was it ligan, because the very definition of the word from the Latin "ligo," to bind, indicates that it must be buoyed; but it was simply property lying at the bottom of the sea, which "awaits its owner." 1 Bl. Comm. 290-295; 3 Black Book Adm. 441, 445; 4 Black Book Adm. 517; Ang. Tidewaters, c. 10; *Baker v Hoag*, 7 N. Y. 555.

Second. The year and a day does not begin to run from the day of the wreck, nor from the time the goods were first discovered, but from the day the goods are actually taken and seized by the finder. Thus, in the case of *Dunwich v. Sterry*, 1 Barn. & Adol. 841, 842, it is said that this year and a day dates from the seizure and actual possession of the lord; "for, until then," says Lord Coke, "it is not notorious who claims the wreck, or to whom the owner shall repair to make his claim, and show him his proofs." This also corresponds to the modern English statute upon the subject of wrecks (17 & 18 Vict. c. 104), by which (section 470) the owner is given a year from the date at which the wreck came into the possession of the receiver to establish his claim. This suit was begun within a year after the coal was raised by the respondent. *Sir Henry Constable's Case*, 5 Coke, 105.

It is entirely clear to my mind that the United States has no title to this coal, even if it were to be treated as derelict, or property of which no owner could be found, since the proprietorship of the State extends to the centre of the lake, subject only to the right of Congress to control its commerce and navigation. *Pollard's Lessee v. Hagan*, 3 How. 212, 230; *Barney v. Keokuk*, 94 U. S. 324, 338.

Nor is there anything in the statute of Illinois which indicates that the title ever became vested in the State. The only statute having any connection with the subject is limited to "watercraft, timber, or plank found adrift on any water-course within the limits or upon the borders of this State," and has no application to any other species of cargo. Starr & C. Ill. St. c. 50, § 21. It could only become the property of the State by applying the common-law doctrine of escheat.

Indeed, after careful search of all the authorities upon the subject, I can find nothing to indicate either that of wrecks of the sea, or property lying at the bottom of the sea, which can be identified by its owner, the owner loses his title, provided he appears within a year and a day to make claim to it. The salvor of such property may, undoubtedly, retain possession of it until his compensation is paid, or may take proceedings to procure a judicial sale in admiralty, and upon such sale it is not unusual to award the whole of the proceeds to the salvor, particularly if his expenses have exceeded the value of the property, but in no other way can the title of the owner be divested.

SECTION III.

WAIFS, ESTRAYS, AND DEODANDS.

1 BL. COM. 297. — Waifs, *bona waviata*, are goods stolen, and waved or thrown away by the thief in his flight, for fear of being apprehended. These are given to the king by the law, as a punishment upon the owner for not himself pursuing the felon and taking away his goods from him. Cro. Eliz. 694. And therefore if the party robbed do his diligence immediately to follow and apprehend the thief (which is called making fresh *suit*), or do convict him afterwards, or procure evidence to convict him, he shall have his goods again. Finch. L. 212. Waved goods do also not belong to the king till seized by somebody for his use; for if the party robbed can seize them first, though at the distance of twenty years, the king shall never have them. Finch. L. 212. If the goods are hid by the thief, or left any where by him, so that he had them not about him when he fled, and therefore did not throw them away in his flight, these also are not *bona waviata*, but the owner may have them again when he pleases. 5 Rep. 109. The goods of a foreign merchant, though stolen and thrown away in flight, shall never be waifs (Fitz., *Abr.*, tit. *Estray*, 1. 3 Bulstr. 19); the reason whereof may be, not only for the encouragement of trade, but also because there is no wilful default in the foreign merchant's not pursuing the thief; he being generally a stranger to our laws, our usages, and our language.

Estrays are such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner of them;¹ in which case the law gives them to the king as the general owner and lord paramount of the soil, in recompense for the damage which they may have done therein; and they now most commonly belong to the lord of the manor, by special grant from the crown. But in order to vest an absolute property in the king, or his grantees, they must be proclaimed in the church and two market towns next adjoining to the place where they are found; and then, if no man claims them, after proclamation and a year and a day passed, they belong to the king or his substitute without redemption (Mirr. c. 3, § 19), even though the owner were a minor, or under any other legal incapacity. 5 Rep. 108. Bro., *Abr.*, tit. *Estray*. Cro. Eliz. 716. A provision similar to which obtained in the old Gothic constitution with regard to all things that were found, which were to be thrice proclaimed: *primum coram comitibus et viatoribus obviis, deinde in proxima villa vel pago, postremo coram ecclesia vel judicio*; and the space of a year was allowed for the owner to

¹ See *State v. Apel*, 14 Tex. 428.

reclaim his property. Stiernh., *Dejur. Gothor.*, l. 3, c. 5. If the owner claims them within the year and day, he must pay the charges of finding, keeping, and proclaiming them. Dalt. Sh. 79. The king or lord has no property till the year and day passed; for if a lord keepeth an estray three-quarters of a year, and within the year it strayeth again, and another lord getteth it, the first lord cannot take it again. Finch. L. 177. Any beasts may be estrays that are by nature tame or reclaimable, and in which there is a valuable property, as sheep, oxen, swine, and horses, which we in general call cattle; and so Fleta (L. 1, c. 43) defines them *pecus vagans, quod nullus petit, sequitur, vel advocat*. For animals upon which the law sets no value, as a dog or cat, and animals *feræ naturæ*, as a bear or wolf, cannot be considered as estrays. So swans may be estrays, but not any other fowl (7 Rep. 17, 19); whence they are said to be royal fowl. The reason of which distinction seems to be that cattle and swans being of a reclaimed nature, the owner's property in them is not lost merely by their temporary escape; and they also, from their intrinsic value, are a sufficient pledge for the expense of the lord of the franchise in keeping them the year and day. For he that takes an estray is bound, so long as he keeps it, to find it in provisions and preserve it from damage (1 Roll. Abr. 889); and may not use it by way of labor, but is liable to an action for so doing. Cro. Jac. 147. Yet he may milk a cow, or the like; for that tends to the preservation, and is for the benefit of the animal. Cro. Jac. 148. Noy. 119.

1 BL. Com. 300. — By this [a deodand] is meant whatever personal chattel is the immediate occasion of the death of any reasonable creature; which is forfeited to the king, to be applied to pious uses, and distributed in alms by his high almoner (1 Hal. P. C. 419. Fleta, l. 1, c. 25); though formerly destined to a more superstitious purpose. It seems to have been originally designed, in the blind days of popery, as an expiation for the souls of such as were snatched away by sudden death; and for that purpose ought properly to have been given to holy church.¹

¹ See Holmes, Common Law.

SECTION IV.

JUDGMENTS.

HUGHES v. CORNELIUS.

KING's BENCH, 1680.

[*Reported 2 Show. 232.*]

TROVER brought for a ship and goods, and on a special verdict there is found a sentence in the admiralty court in France, which was with the defendant [plaintiff].

And now *per Curiam* agreed and adjudged, that as we are to take notice of a sentence in the admiralty here, see *Ladbroke v. Crickett*, 2 Term Rep. 649, so ought we of those abroad in other nations, and we must not set them at large again, for otherwise the merchants would be in a pleasant condition; for suppose a decree here in the Exchequer, and the goods happen to be carried into another nation, should the courts abroad unravel this? It is but agreeable with the law of nations that we should take notice and approve of the laws of their countries in such particulars. If you are aggrieved, you must apply yourself to the king and council; it being a matter of government, he will recommend it to his liege ambassador if he see cause; and if not remedied, he may grant letters of marque and reprisal.

And this case was so resolved by all the court upon solemn debate; this being of an English ship taken by the French, and as a Dutch ship in time of war between the Dutch and the French.¹

Judgment for the defendants [plaintiff].

¹ The special verdict was, that one William Gault, a denizen of England, was owner of the ship at the time she was taken; that the master of the ship was a native of Holland, but made a denizen of England; that two of the sailors were Dutchmen, and the mate, with the eight other mariners, Englishmen; that the ship was Dutch-built, and taken during the war between Holland and France, and condemned as a Dutch prize in the court of admiralty in France, and sold to the plaintiff Hughes under that sentence; and that on her arrival in England, the defendant Cornelius and others, as the servants of William Gault, took and converted the ship to their own use. s. c. Raym. 473. The sentence of the admiralty was produced under seal. 2 Ld. Raym. 893. But the court would not suffer this verdict to be argued, but ordered judgment to be entered for the plaintiff; for sentence in a court of admiralty ought to bind generally, according to *jus gentium*, s. c. Skinner, 59, although the facts found by the special verdict were contrary to, and falsified the sentence in, the admiralty court. s. c. cited by Holt, C. J., who was counsel for the plaintiff, 2 Ld. Raym. 893, for the property is thereby altered, though the sentence be unjust. s. c. cited *Ewer v. Jones*, 2 Ld. Raym. 936. Carth. 225. 9 Mod. 66. Bull. N. P. 244, 245. It has, however, been determined that a sentence of condemnation in a foreign court of admiralty is not conclusive evidence that a ship was not neutral, unless it appear that the condemnation went upon that ground, *Bernarde v. Motteux*, Dougl. 54; but such a sentence is *conclusive* as to every thing that appears on the face of it, *Barzillay v. Lewis*, Park.

GRIFFITH v. FOWLER.

SUPREME COURT OF VERMONT. 1846.

[Reported 18 *Vt.* 390.]

TRESPASS for taking a shearing machine. The case was submitted upon a statement of facts, agreed to by the parties, from which it appeared, that in 1836 the defendant, being the owner of the machine in question, lent it to one Freeman, to use in his business as a clothier, who was to pay a yearly rent therefor, and in whose possession it remained until the year 1841, when it was sold at sheriff's sale, on execution, as the property of Freeman, and one Richmond became the purchaser; that Richmond, in January, 1842, sold the machine to the plaintiff, who at the same time purchased of Freeman the building, in which the machine was situated, and took possession thereof; and that the defendant, in February, 1842, took the machine from the plaintiff's possession, claiming it as his property. The value of the machine was admitted to be fifty dollars.

Upon these facts the county court, — HEBARD, J., presiding, — rendered judgment for the defendant. Exceptions by plaintiff.

Ins. 359; so, where no special ground is stated in the sentence, but the ship is condemned generally as good and lawful prize, *Saloucci v. Woodhouse*, Park. 362; unless manifestly, upon the face of it, against law and justice, *Saloucci v. Johnston*, Park. Ins. 364; or contradictory to itself, *Mayne v. Walter*, Park. 363. And see the case of *Burton v. Fitzgerald*, Stra. 1078. — *Note by Thomas Leach.*

NOTE. — "When a tribunal, no matter whether in England or a foreign country, has to determine between two parties, and between them only, the decision of that tribunal, though in general binding between the parties and privies, does not affect the rights of third parties; and if in execution of the judgment of such a tribunal process issues against the property of one of the litigants, and some particular thing is sold as being his property, there is nothing to prevent any third person setting up his claim to that thing, for the tribunal neither had jurisdiction to determine, nor did determine, anything more than that the litigant's property should be sold, and did not do more than sell the litigant's interest, if any, in the thing. All proceedings in the courts of common law in England are of this nature, and it is every day's experience that where the sheriff, under a *fiery facias* against A, has sold a particular chattel, B may set up his claim to that chattel either against the sheriff or the purchaser from the sheriff. And if this may be done in the courts of the country in which the judgment was pronounced, it follows, of course, that it may be done in a foreign country. But when the tribunal has jurisdiction to determine not merely on the rights of the parties, but also on the disposition of the thing, and does in the exercise of that jurisdiction direct that the thing, and not merely the interest of any particular party in it, be sold or transferred, the case is very different.

"It is not essential that there should be an actual adjudication on the status of the thing. Our courts of admiralty, when property is attached and in their hands, on a proper case being shown that it is perishable, order that it shall be sold and the proceeds paid into court to abide the event of the litigation. It is almost essential to justice that such a power should exist in every case where property, at all events perishable property, is detained." Per BLACKBURN, J., in *Castrique v. Imrie*, L. R. 4 H. L. 414, 427, 428 (1870).

See *Megae v. Beirne*, 39 Pa. 50.

Tracy and Converse, for plaintiff.

J. S. Marcy, for defendant.

The opinion of the court was delivered by

REDFIELD, J.: The only question reserved in this case is, whether a title to personal property, acquired by purchase at sheriff's sale, is absolute and indefeasible against all the world, or whether such sale only conveys the title of the debtor.

There has long been an opinion, very general, I think, in this state, not only among the profession, but the people, that a purchaser at sheriff's sale acquires a good title, without reference to that of the debtor, that such a sale, like one in market overt in England, conveys an absolute title. But, upon examination, I am satisfied that this opinion acts upon no good basis.

So far as can now be ascertained, this opinion, in this state, rests mainly upon a *dictum* in the case of *Heacock v. Walker*, 1 Tyl. 338. There are many reasons, why this *dictum* should not be regarded, if the matter were strictly *res integra*. It was a declaration of the chief justice in charging the jury. Cases were then tried by the jury at the bar of this court, as matter of right, and in course, and before the law of the case had been discussed and settled by the court. In all these respects these trials differed essentially from jury trials at the bar of the higher courts in Westminster Hall. Such trials, there, being only matter of favor, granted in the most important cases, and after the law of the cases has been fully discussed, and settled by the court.

The law given to the jury, in the two cases, will of course partake something of the character of the respective form and deliberation of the trials. Under our former practice, law laid down in the course of a jury trial, unless when questions were reserved and farther discussed upon motions for new trials, was not much esteemed, even when it was upon the very point in dispute. But especially, the *dicta* of the judge, who tried the case, and who must, of necessity, somewhat amplify the bare text of the law, in order to show the jury the reason upon which it was based, could not be esteemed, as any thing more than the hastily formed opinion of the judge — mere argument, to satisfy some possible, or apprehended, doubt of the jury in regard to the soundness of the main proposition laid down. Such was the *dictum* referred to. That, which was said of Chief Justice Tilghman, of Pennsylvania, is undoubtedly good praise, when said of any judge; — “He made no *dicta*, and he regarded none.” There are sufficient reasons, why the *dictum* should not be regarded, if the thing were new. And we do not esteem the long standing of the *dictum* of any importance, unless it can be shown, that it has thus grown into a generally received and established law, or usage; which, we think, is not the case in regard to this. For this court has, within the last ten years, repeatedly held, that a sheriff's sale was of no validity to pass any but the title of the debtor, *when no actual delivery of the thing sold was made by the sheriff, at the time of sale*. *Austin v. Tilden et al.*, 14 Vt. 325; *Boynnton v. Kelsey*,

Caledonia County, 1836; s. p. Lamoille County, 1841. Since the first of these cases was decided, the main question, involved in this case, has been considered doubtful in this state, and we now feel at liberty to decide it, as we think the law should be, that is, as it is settled at common law.

But the idea, that some analogy existed between a sheriff's sale and a sale in market overt is certainly not peculiar to the late Chief Justice Tyler. This opinion seems at one time to have prevailed in Westminster Hall, to some extent, at least; for in the case of *Farrant v. Thompson*, 5 B. & A. 826, which was decided in the King's Bench in 1822, nearly twenty years later than that of *Heacock v. Walker*, one of the points raised in the trial of the case before Chief Justice Abbott was, that the title of the purchaser, being acquired at sheriff's sale, was good against all the world, *the same as that of a purchaser in market overt*. This point was overruled, and a verdict passed for the plaintiff, but with leave to move to set it aside, and to enter a nonsuit, upon this same ground, with one other. This point was expressly argued by Sir James Scarlett, — who was certainly one of the most eminent counsel, and one of the most discriminating men of modern times, — in the King's Bench, and was decided by the court not to be well taken. Since that time I do not find, that the question has been raised there.

It seems to be considered in Massachusetts, and in New York, and in many of the other states, that nothing analogous to markets overt in England, exists in this country. *Dame v. Baldwin*, 8 Mass. 518; *Wheelwright v. DePeyster*, 1 Johns. 480; 2 Kent, 324, and cases there cited. Nothing of that kind, surely, exists in this state, unless it be a sheriff's sale. And if the practice of holding sales in market overt conclusive upon the title existed in any of the states, it would be readily known. I conclude, therefore, that Chancellor Kent is well founded in his opinion, when he affirms, that the law of markets overt does not exist in this country. Ib.

It seems probable to me, that the idea of the conclusiveness of a sheriff's sale upon the title is derived from the effect of sales under condemnations in the exchequer, for violations of the excise or revenue laws, and sales in prize cases, in the Admiralty courts, either provisionally, or after condemnation. But these cases bear but a slight analogy to sheriff's sales in this country, or in England. Those sales are strictly judicial, and are merely carrying into specific execution a decree of the court *in rem*, which, by universal consent, binds the whole world.

Something very similar to this exists, in practice, in those countries, which are governed by the civil law; which is the fact in one of the American states, and in the provinces of Canada, and in most, if not all, the continental states of Europe. The property, or what is claimed to be the property, of the debtor is seized and libelled for sale, and a general monition served, notifying all having adversary claims to

interpose them before the court, by a certain day limited. In this respect the proceedings are similar to proceedings in prize courts, and in all other courts proceeding *in rem*. If no claim is interposed, the property is condemned, by default, and sold; if such claims are made they are contested, and settled by the judgment of the court, and the rights of property in the thing are thus conclusively settled *before the sale*.

But with us nothing of this character exists in regard to sheriff's sales. Even the right to summon a jury to inquire into conflicting claims *de bene esse*, as it is called in England, and in the American states, where it exists, has never been resorted to in this state. And in England, where such a proceeding is common, — *Impey*, 153; *Dalton*, 146; *Farr et al. v. Newman et al.*, 4 T. R. 621, — it does not avail the sheriff, even, except to excuse him from exemplary damages. *Latkow v. Eamer*, 2 H. Bl. 437; *Glassop v. Poole*, 3 M. & S. 175. It is plain, then, that a sheriff's sale is not a judicial sale. If it were, no action could be brought against the sheriff, for selling upon execution property not belonging to the debtor.

With us an execution is defined to be the putting one in possession of that, which he has already acquired by judgment of law. Co. Lit. 154 a. (Thomas' Ed. 405.) But the judgment is of a sum *in gross* "to be levied of the goods and chattels of the debtor," which the sheriff is to find *at his peril*. The sale upon the execution is only a transfer, by operation of law, of what the debtor might himself transfer. It is a principle of the law of property, as old as the Institutes of Justinian, *Ut nemo plus juris in alium transferre potest, quam ipse habet*.

The comparison of sheriff's sales to the sale of goods lost, or estrays, in pursuance of statutory provisions, which exist in many of the states, does not, in my opinion, at all hold good. Those sales undoubtedly transfer the title to the thing, as against all claims of antecedent property in any one, if the statutory provisions are strictly complied with; but that is in the nature of a forfeiture, and is strictly a proceeding *in rem*, wherein the finder of the lost goods is constituted the *tribunal of condemnation*.

There being, then, no ground, upon which we think we shall be justified in giving to a sheriff's sale the effect to convey to the purchaser any greater title, than that of the debtor, the judgment of the court below is affirmed.

SECTION V.

SALE IN MARKET-OVERT.

THE CASE OF MARKET-OVERT.

NEWGATE SESSIONS. 1595.

[Reported 5 Co. 83 b.]

At the sessions of Newgate now last past, it was resolved by Popham, Chief Justice of England, Anderson, Chief Justice of the Common Pleas, Sir Thomas Egerton, Master of the Rolls, the Attorney-General, and the court, that if plate be stolen and sold openly in a scrivener's shop on the market-day (as every day is a market-day in London except Sunday) that this sale should not change the property, but the party should have restitution; for a scrivener's shop is not a market-overt for plate; for none would search there for such a thing; & *sic de similibus*, &c. But if the sale had been openly in a goldsmith's shop in London, so that any one who stood or passed by the shop might see it, there it would change the property. But if the sale be in the shop of a goldsmith, either behind a hanging, or behind a cupboard upon which his plate stands, so that one that stood or passed by the shop could not see it, it would not change the property: so if the sale be not in the shop, but in the warehouse, or other place of the house, it would not change the property, for that is not in market-overt, and none would search there for his goods. So every shop in London is a market-overt for such things only which, by the trade of the owner, are put there to sale; and when I was Recorder of London, I certified the custom of London accordingly. Note, reader, the reason of this case extends to all markets-overt in England.¹

SECTION VI.

STATUTE OF LIMITATIONS.

BRYAN v. WEEMS.

SUPREME COURT OF ALABAMA, 1856.

[Reported 29 Ala. 423.]

APPEAL from the chancery court of Dallas.

Heard before the Hon. James B. Clark.

¹ In the United States there are no markets-overt, *Dame v. Baldwin*, 8 Mass. 518, 521; *Griffith v. Fowler*, 18 Vt. 390.

The case made by the record may be thus stated: In December, 1831, Simmons Harrison, of the county of Jones in North Carolina, there executed a deed of gift, conveying certain slaves to one William H. Green, his heirs, executors, and administrators, in trust for the sole and separate use, benefit, and behoof of Mrs. Mary R. Bush, who was the daughter of said Harrison and the wife of Nathan B. Bush, during her life; and after her death, for the use, benefit, and behoof of her children by the said Nathan B. Bush, and their heirs forever. Soon after the execution of this deed, Bush and his wife removed to this State, and brought with them the slaves conveyed by the deed. Mrs. Bush died in 1837, leaving three children, Holland, Mary, and Penelope. The slaves remained in the possession of said Nathan B. Bush until his death which happened in 1844, at which time he had acquired several others by his industry and economy, and by the services of the slaves conveyed by the deed. By his last will and testament, which was duly admitted to probate, and of which one Alexander Sledge was the executor, said Bush bequeathed all the slaves then in his possession, including those conveyed by the deed, with the increase of the females, to his three daughters, but not in equal portions — the bequest to Penelope being larger than the others. The executor proved the will, took possession of all the property, proceeded to a settlement of the estate, and delivered the slaves to the respective legatees. After the death of said Bush, his daughter Holland married Frederic B. Bryan; Mary married Thomas J. McQueen; and Penelope, the youngest, married Samuel W. Weems. In August, 1850, Mrs. Weems died, having bequeathed all her property to her said husband, who afterwards proved her will, and took possession of all her slaves and other property.

In December, 1850, Mr. and Mrs. Bryan, with Mary Bush, who was then unmarried, filed their bill against said Green, Weems and Sledge; alleging their ignorance of the deed from Simmons Harrison until a short time previous to the filing of the bill; and asking that the said Sledge, as executor of Bush, might be made to account for the hire and services of the slaves during the life of his testator, and that the slaves might be divided between Mrs. Bryan and Mrs. McQueen.

The defendant Weems answered the bill, demurring for want of equity, and setting up the statute of limitations in defense of the suit. The answer also contains other matter, which is not deemed material.

On final hearing, the chancellor held the statute of limitations a bar to the relief sought, and therefore dismissed the bill; and his decree is now assigned as error.

Wm. M. Byrd, for the appellants.

A. R. Manning, contra.

STONE, J. We are fully satisfied with the views of the chancellor, and the result which he attains on all the points necessary to a decision of this case.

1. However the rule might be, if the trustee in this case were appointed by will (Hill on Trustees, 239), his estate and interest did not

terminate with the life of Mrs. Bush. The deed of Simmons Harrison conveyed the property to the trustee, "his heirs, executors, and administrators," . . . "in trust and for the following uses, interests, and purposes; viz., in trust and for the separate and exclusive use and benefit of the said Mary R. Bush during her natural life, and in no wise, or manner to be subject or liable to or for the contracts or debts of the said husband, Nathan B. Bush; and after her death, for the use, benefit and behoof of the children of the said Mary R. Bush by her present husband, the said Nathan B. Bush, and their heirs forever." There are no words in this deed, indicating an intention that the estate in fee, which the deed creates in the trustee, shall be cut down into a less estate. The estate of the trustee continued after the death of both Mrs. and Mr. Bush. *Wykham v. Wykham*, 18 Vesey, 395; *Coleman v. Tindall*, Y. & J. 605; *Jones v. Strong*, 6 Ired. 367; *Murritt v. Wendley*, 3 Dev. 399; *Martin v. Prage*, 4 B. Monroe, 524; *Fry v. Smith*, 2 Dana, 38.

Our own decisions are not in conflict with this. In *Smith v. Rudde*, 15 Ala. 28, the deed directed that at the death of the said Elizabeth H., the property, both real and personal, was to go to and be equally divided between the children. Elizabeth H. was dead; and of course the estate of the trustee was an end.

In *Comby v. McMichael*, 19 Ala. 747, the deed directed the trustee to "convey the property to such of the issue" of the *cestui que trust*, as should be living *at her death*. Mrs. McMichael was dead; and Ch. J. Dargan held, that the legal title of the trustee had determined, because the deed clearly contemplated that result.

Couthway v. Berghaus, 25 Ala. 393-406, simply decides that a tender in that case to the *cestui que trust* was sufficient. The trustee lived out of the State, and was a mere naked trustee without interest. The *cestui que trust* had himself made the purchase of the property, taking the title in the name of his sister; while he, the beneficiary, was in possession of the property, receiving the rents and profits. The court rightly held, that the money was due to Berghaus, and that the tender to him was sufficient.

2. While Mr. Bush held the possession of the slaves, he must be regarded as holding in subordination to the title of the trustee. His declarations to Mr. Green, and to Mr. Whitfield, shortly before his death, would establish this proposition, if it needed confirmation. A short time before the death of Mr. Bush, he expressed to the trustee an inclination and wish to make a will, and to make more ample provision for Penelope, who afterwards married Mr. Weems; speaking of her as his "poor afflicted daughter." The testimony of Mr. Green, the trustee, who was examined as a witness, satisfies us that he, Green, knew of the making of a will by Bush, and its "general character," before such will was admitted to probate. This was, at least, enough to put him on inquiry; and is equivalent to notice. *Smith v. Zurcher*, 9 Ala. 208, and authorities cited. The bill, after stating that Mr. Bush executed his will and died in June, 1844, proceeds as follows: "Whereupon Alex-

ander Sledge, the executor named in said will, caused the same to be duly admitted to probate in the Orphans' Court of said county; obtained letters testamentary upon said estate, from the same court; undertook the execution of said will, and possessed himself as such executor as aforesaid of all the slaves and other personal property mentioned therein." The will mentions all the slaves in controversy, except some children born since the probate, of females bequeathed by the will; a part of which children are with their mothers in the possession of each legatee. The answer admits these averments, but states that the executor possessed himself of the property before the will was probated. These several facts constituted the executor an adverse holder, from and after the probate of the will, and possession of the property under it by him. From that time the statute commenced running against Green, the trustee. *Findley v. Patterson*, 2 B. Monroe, 76; *Den, ex dem.*, v. *Shanklin*, 4 Dev. & Bat. Law, 289.

3. Between the time of the probate of the will of Mr. Bush, and the commencement of this suit, more than six years elapsed. The trustee was then barred of his action of detinue. The rule is certainly well settled, that if a trustee delay the assertion of his rights until the statute perfects a bar against him, the *cestui que trust* will also be barred. *Colburn v. Broughton*, 9 Ala. 351-363; *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 628-629; Angell on Limitation, 514, § 6; *Bond v. Hopkins*, 1 Sch. & Lef. 429; *Freeman v. Perry*, 2 Dev. Eq. 243; *Couch v. Couch*, 9 B. Monroe, 160; *Falls v. Torrence*, 4 Hawks' Law & Eq. 412.

4. It will be seen that we have assimilated the complainant's right to relief in this case to the trustee's right to maintain detinue. If, at the time the bill in this case was filed, Green, the trustee, had instituted his action of detinue or trover for the slaves, against Sledge, the executor, the six years statute, if pleaded, would have barred either action, not only as to the slaves bequeathed by the will, but also as to the offspring of the females, born after the adverse holding. *Morris v. Perregay*, 7 Gratt. 373; *White v. Martin*, 1 Porter, 215.

When defendant's right to property is established by a successful interposition of the plea of the statute of limitations, it relates back to the time of the first taking, and carries with it all the intermediate profits, and the increase of the females while in the adverse possession of such defendant, unless, as to such increase, some act be done before the bar against recovery of the mother is perfected, which prevents the operation of this rule. *Partus sequitur ventrem*. To hold otherwise, would lead to strange results in the case of female slaves. An adverse holding of six years would vest the title in the holder. During the time she was adversely held, she may, at intervals, have given birth to children; she and the children all the time remaining together, out of the possession of the claimant. She may have given birth to an infant within a very short time before the completion of the six years. According to the argument, all claim to the mother would be forfeited, while to bar

the right to recover her child would require another period of near six years.

Another illustration may serve to present this argument in a stronger light. Suppose the property adversely held consist of domestic animals, who multiply at an early age, and rapidly. Before the six years expire, the females, in all probability, will have increased abundantly; and perhaps at no point of coming time, will there be a female that has reached the age of six years, without yielding her increase. If the offspring do not follow the mother as an incident, but each successive scion must itself be adversely held for the term of six years before the statute runs, unless, before its birth, the parent stock had existed and been adversely held for a like period, the entire interest of the former owner would not probably be extinguished in any conceivable number of years. This point was not raised in argument; but we have felt it our duty to notice it, as the court is not unanimous.

The claim for hire, and for profits of the labor of the slaves, while in the possession of Mr. Bush, is barred both by lapse of time, and by the statute of non-claim.

Under these principles, the right of complainants is barred. Whether Mr. Bush, or those claiming under him, can set up fraud in the original deed to Mr. Harrison, and from him to Mr. Green in trust, we need not inquire. See *Walton v. Bonham*, 24 Ala. 513; *Twine's Case*, 3 Rep. 83; *Roberts on Conveyances*, 10-11.

The decree of the chancellor is affirmed.

FEARS, ADMR. v. SYKES.

HIGH COURT OF ERRORS OF MISSISSIPPI. 1858.

[*Reported 35 Miss. 633.*]

ERROR to the Circuit Court of Monroe County. Hon. William Cothran, judge.

Locke E. Houston, for plaintiff in error.

C. Sykes, for defendant in error.

HANDY, J., delivered the opinion of the court.

This action was brought by the plaintiff in error to recover from the defendant a female slave in his possession, alleged to be the property of the plaintiff's intestate.

It appears, by the record, that the slave in controversy had been the property of one John Chism, in the State of Alabama, prior to, and during, the year 1839, and, on the 16th September of that year, that Chism executed a bill of sale for her to the plaintiff's intestate, Hansford J. Fears; that, on the 12th October of the same year, Chism executed a bill of sale for the slave, for a valuable consideration, to one Lewis G. Garrett, who, during that year, had her in open and public posses-

sion in the State of Alabama, and continued in possession there until August, 1853, when he sold her to the defendant for a valuable consideration, who brought her to this State, and has since continued in possession. There is some evidence tending to show that, when Chism sold the slave to Garrett, he took her from the possession of Fears without authority, and delivered her to Garrett, and that Fears was desirous of regaining possession of her, but was unable to find where she was. Yet it is fully proved that Garrett had her in open and notorious possession, in a hotel kept by him in the town of Tuscumbia, in Alabama, for the greater part of the time when he owned her, claiming title to her. It is further shown, that the plaintiff's intestate removed to this State in the year 1842 or 1843.

The decision of the case, under this state of facts, depends upon the question whether Garrett acquired a good title in virtue of his adverse possession in the State of Alabama, which is available to the defendant.

It is true that the Statute of Limitations of another State is not technically pleadable as a defence to a demand sued for in the courts of this State, because the defence of such statute strictly pertains to the *lex fori*; though to this rule there may be exceptions. Yet, where title to personal property has been acquired under the laws of another State, by reason of possession held by a party for such length of time as, under those statutes, renders his title unimpeachable, such title may be shown in this State, and will be available to the party having such possession for the requisite time, and those claiming under him. In such case, it is not the Statute of Limitations of another State that is relied on, or pleaded, but the title acquired by operation of such statute; and, when a title becomes perfect under the laws of one State, it is valid in any other State. *Shelby v. Gay*, 11 Wheat. 362; *Moseby v. Williams*, 5 How. 520-523.

It appears to be the settled law of Alabama, that the Statute of Limitations of that State, which bars the remedy for the recovery of personal property, also acts upon the title, and destroys the right of the party setting up claim against the person in possession. *Sims v. Canfield*, 2 Ala. 555; *Lay's Exor. v. Lawson*, 23 Ala. 377.

Hence, it is clear that the title of Garrett could not be questioned by the plaintiff, after a possession in Alabama for about fourteen years. Nor is the question affected by the fact, that Fears removed to this State, before the bar had become complete by the possession of Garrett for the time prescribed by the statute. Garrett continued to reside there, and had the slave in possession, and could have been sued there at any time, notwithstanding the removal of Fears; and it is this which bars the remedy, and vests the right in the possessor, whether the person setting up title against the possessor resided there or not. The non-residence of the claimant does not appear to be enumerated as one of the exceptions in the statute, and there can be no reason why it should be allowed, especially when he was a resident of the State when the adverse possession commenced, and so continued for several years.

But it is insisted that it was a sufficient answer to the title of Garrett, arising from the Statute of Limitations, that Chism took the slave from the possession of the plaintiff's intestate fraudulently, and carried her away secretly, so that she could not be found.

However these considerations might have operated in an action by the plaintiff against Chism, if the slave had been in his possession, they can have no effect upon the title of Garrett, or of the defendant derived from him. For aught that is alleged, Garrett had no connection with the fraudulent taking, or the concealment, of the slave; but he appears to have purchased her fairly and for full value, and to have had her in his possession in a very public manner. The remedy of the plaintiff's intestate against him was open, and in no wise obstructed, during all the period of his possession. His title, therefore, could not be affected by the fraud of Chism, and it became unimpeachable after his possession had continued for the period of six years, prescribed by the statute of Alabama. That title was conveyed to the defendant, and constituted an ample defence to his action.

Let the judgment be affirmed.

MILLER v. DELL.

COURT OF APPEAL. 1891.

[Reported [1891] 1 Q. B. 468.]

APPLICATION by the plaintiff to set aside the judgment entered for the defendant at the trial before Charles, J., and a common jury, and to enter judgment for the plaintiff or for a new trial.

The facts were as follows: The plaintiff was the owner of the lease of a house used by him as a refreshment house; the plaintiff's son managed the business for him, and there was an agreement between the plaintiff and his son for an assignment of the lease to the latter upon certain conditions; the conditions, however, were not performed, and the son never became entitled to have an assignment of the lease made to him. In 1881, more than six years before the commencement of this action, the plaintiff's son, without the knowledge or consent of the plaintiff, deposited the lease with one Bates to secure an advance of 150*l.*, and signed an ordinary memorandum of deposit containing an agreement to execute a legal mortgage of the premises if and when called upon. Within six years of the commencement of the present action Bates became bankrupt, and in 1889 the trustee under his bankruptcy sold his business to the defendant, including the debt of 150*l.*, and handed over to him the lease which had been deposited as security. Subsequently the plaintiff demanded the return of the lease from the defendant, and upon his refusal to give it up commenced this action for

detinue and conversion of the lease, to which the defendant pleaded the Statute of Limitations (21 Jac. 1, c. 16). At the trial the learned judge, acting upon the authority of *Wilkinson v. Verity*, Law Rep. 6 C. P. 206, held that the action was barred by the statute, and directed judgment to be entered for the defendant.

LORD ESHER, M.R. This is an action for wrongful conversion or detinue of a lease. Whatever the defendant did in regard to the lease, whether his acts amounted to detinue or conversion, is immaterial, for in either case it was within six years of the commencement of this action, and if there were nothing more, the Statute of Limitations would be no bar to the plaintiff's claim against the defendant. But what the defendant relies on is that Bates converted this lease to his own use more than six years ago, and it is contended that this was the first wrongful conversion, and that the statute runs from the time when that first wrongful conversion occurred. The case of *Wilkinson v. Verity*, Law Rep. 6 C. P. 206, was cited in support of this contention at the trial before Charles, J., and especial reliance was placed on a passage in the judgment of Willes, J. (at p. 209), who says: "It is a general rule that, where there has once been a complete cause of action arising out of contract or tort, the statute begins to run, and that subsequent circumstances which would but for the prior wrongful act or default have constituted a cause of action are disregarded." But it is plain that Willes, J., was there dealing with a case in which the defendant himself and nobody else was charged with the wrongful detention. The defendant himself was the sole wrongdoer, and the language of the passage relied upon, though general in its terms, must be applied to such circumstances as those in that case. Moreover, Willes, J., immediately goes on to give the following illustration: "As for instance, in the case of a bill of exchange drawn at so many months after sight, and refused acceptance, the cause of action is complete, and the statute begins to run upon the refusal of acceptance, and no new cause of action arises upon refusal of payment" — language which shows that what he meant was, that where there was a valid cause of action against the defendant by the plaintiff, the statute began to run from the time when that cause of action arose.

In the present case, it is sought on behalf of the defendant to extract from that decision this doctrine — that if one man is guilty of a wrongful conversion, and afterwards a second man is guilty of a wrongful conversion of the same thing, then the cause of action against the second man is barred by the statute if the cause of action against the first man accrued more than six years before action, although the conversion in respect of which the second man is sued may have occurred within the six years, or indeed within six months. It is said that to hold otherwise would be contrary to reason and natural law; that is to say, that because the legislature, in order to prevent litigation after a certain period, has said that no action shall lie against A. in respect of an act done by him more than six years before action brought, therefore B.

cannot be sued in respect of an act done by him within the six years. To me that proposition seems contrary to reason ; but whether it be so or not, I am of opinion that in the present case the Statute of Limitations does not apply ; it applies only to an action brought against the defendant in respect of a wrongful act done by the defendant himself. The property in chattels, which are the subject-matter of this action, is not changed by the Statute of Limitations though more than six years may elapse, and if the rightful owner recovers them the other man cannot maintain an action against him in respect of them. I think that the effect of the judgment in *Wilkinson v. Verity*, Law Rep. 6 C. P. 206, was misconceived by the learned judge, and that that case is no authority in favor of the defendant.

The other case which was cited to us, that of *Spackman v. Foster*, 11 Q. B. D. 99, seems to be applicable to the present, especially upon the point that a lease, being a document of title, is not a mere chattel, and that therefore where title deeds are fraudulently taken from the rightful owners and deposited with a third person, until demand and refusal to give up the deeds to the real owners they have no right of action against the third person against which the statute would run. Whether the statute would run to prevent a person rightfully in possession of land getting back his documents of title more than six years after their conversion, is a question which would require consideration, and I do not say that he could not get them back though they had been wrongfully held for more than six years. This appeal must be allowed, and judgment entered for the plaintiff.¹

SECTION VII.

ACCESSION.

INST. 2, 1 (25, 26, 33, 34). When any one has converted another person's property into a new form, the question is often asked, which of them is the owner thereof on natural principles ; whether the man who made the thing, or rather he who was previously the owner of the substance : for example, when any one has made wine or oil or corn from the grapes or olives or ears of another, or made any vessel of another's gold or silver or copper, or compounded mead of another's wine or honey, or made a plaster or eye-salve of another's drugs, or a garment of another's wool, or a ship or chest or seat out of another's planks. And after many controversies between the Sabinians and

¹ The opinions of LOPES and KAY, L.JJ., concurring, are omitted.

On the subject of "tacking" successive holdings in order to make up the statutory period, see 3 Harv. Law Rev. 313, 318, 321 ; *Beadle v. Hunter*, 3 Strobh. 331 ; *Chapin v. Freeland*, 142 Mass. 383.

Proculians, the middle view has been approved, held by those who think that if the new form can be reconverted into its materials, that man is to be regarded as owner who was originally owner of the materials; but that if it cannot be reconverted, the other who made it is to be regarded as owner: for example, a vessel made by casting can be reconverted into the rough mass of copper or silver or gold; but wine or oil or corn cannot be returned into grapes or olives or ears, neither can mead be resolved into wine and honey. But when a man has created a new form out of materials partly his own and partly another's, for instance, when he has compounded mead out of his own wine and another person's honey, or a plaster or eye-salve out of his own drugs and those of other people, or a garment out of wool partly his and partly another's, in such a case there is no doubt that the maker is the owner; since he has not only given his labour, but provided also a portion of the materials of the article.

If, however, any one has interwoven with his own garment purple thread which belongs to another person, the purple thread, though the more valuable, accrues to the garment as an accessory; and the former owner of the purple thread has an action of theft and a condictio against the man who stole it, whether the latter or another person be the maker of the garment: for although things that have ceased to exist cannot be recovered by vindication, yet a condictio lies for them against thieves and certain other possessors.

Writing too, even if of gold, is as much an accessory to the paper or parchment, as buildings or crops are an accessory to the soil: and therefore, if Titius have written on your paper a poem, a history, or an oration, you, and not Titius, are regarded as the owner of the substance. But if you claim from Titius your books or parchments, and do not offer to pay the expense of the writing, Titius can defend himself by plea of fraud, at any rate if he obtained possession of the paper or parchment in good faith.

If any man have painted upon another's tablet, some think that the tablet is an accessory to the picture: whilst others hold that the picture, however valuable it may be, is an accessory to the tablet. But to us it seems better that the tablet should be an accessory to the picture; for it is absurd that a picture by Apelles or Parrhasius should go as an accessory to a paltry tablet. Hence, if the owner of the tablet be in possession of the picture, and the painter claim it from him, but refuse to pay the price of the tablet, he can be met by the plea of fraud. But if the painter be in possession, it follows that the owner of the tablet will be allowed an *utilis actio* against him: although in such case, unless he pay the expense of the painting, he can be met by the plea of fraud, at any rate if the painter took possession in good faith. For it is clear that if the painter or any one else stole the tablet, the owner thereof has an action of theft.

ANONYMOUS.

1489.

[Reported Year-Book, 5 Hen. VII. 15, pl. 6.]

A WRIT of trespass was brought for the taking of so many slippers and shoes, and the defendant said that he was possessed of so many dickers of leather, and delivered them to one J. S., who gave them to the plaintiff; and afterwards the plaintiff made the slippers and shoes and boots, and the defendant came and took them as he well might. Judgment if the action lay. . . .¹

[The plaintiff] moved the court that this plea, that the defendant could take them back, was not good; but by the making of shoes and boots, &c., the property was altered, because they were now of another nature. As if one takes barley or grain and makes malt of it, he from whom the grain was taken cannot take the malt, because the chattel is changed into another nature. And so it is if trees are taken, and out of them a house is made, he from whom the trees were taken cannot tear down the house and take them back, and so other chattels are joined together with it. For where a chattel is taken with force, and no other chattel is joined or mixed with it, and it is not altered into another nature, the party can take it. So if one takes a tree, and squares it with an axe, now the party can take it, because it is not altered into another nature, nor is any other chattel mixed with it or joined to it; but if a man takes silver, and then makes a piece of it, or takes a piece of silver and has it gilt with gold, in this case the party cannot take it; and so here the leather is mixed with thread, and therefore the party cannot take it; and so it seems that the plea is not good. And the court holds the contrary clearly. And as to the cases of grain taken and malt made from it, the party cannot take it, because the grain cannot be known. And so it is with pennies or groats, and a piece made of them, it cannot be taken, because of the pennies one cannot be known from another. And so if one takes a piece, and strikes pennies from it at the mint, the party cannot take the pennies, because the pennies cannot be known one from another; and so in all like cases. And also in the case of the building of a house, now the timber is altered, for now it is freehold, and for this reason he cannot take it; but in every case where the chattels themselves can be known, there the party can take them, notwithstanding that some chattel is joined or mixed with them. As if one takes a piece of cloth and makes a coat for himself, the party can take it back well enough, because it is the same chattel and not at all altered; and so it is in the case put, if one cuts a tree and squares it, the party can take it well enough, because the tree can be known well enough notwithstanding. And so it is of iron, where a smith makes of it a bar, &c. And so it was held by all the court. Wherefore the plaintiff replied, for that matter appeared.

¹ A part of the case relating to a point of pleading is omitted.

SILSBURY v. McCOON.

SUPREME COURT OF NEW YORK. 1844, 1847. COURT FOR THE CORRECTION OF ERRORS. 1850.

[Reported 6 Hill, 425; 4 Denio, 332; 3 Comst. 379.]

TROVER for a quantity of whisky, tried at the Montgomery circuit in May, 1843, before Willard, C. Judge. The facts proved by the plaintiffs to establish their title to the whisky were as follows: On the 18th of February, 1842, the sheriff of Montgomery levied on five hundred bushels of grain by virtue of a *fi. fa.* against one Wood in favor of Eldert Tymason. The grain was in Wood's distillery at the time, having been purchased by him with a view of manufacturing it into whisky, and the sheriff did not remove it. Shortly after the levy, the plaintiffs, who it seems succeeded Wood in the possession of the distillery, converted the grain into whisky. When the sheriff went to the distillery for the purpose of selling, he was informed by Silsbury, one of the plaintiffs, that they had converted the grain into whisky, and were willing to pay for it; but no terms were then agreed upon. On the 10th of March, 1842, the plaintiffs gave their note to the sheriff for the grain, allowing him fifty cents per bushel; and Tymason afterwards accepted the note as so much paid upon the *fi. fa.* The whisky in question was a part of that which the plaintiffs had manufactured from the grain levied on by the sheriff.

The defence was as follows: On the 25th of February, 1842, after the whisky in question had been manufactured by the plaintiffs, it was seized by one of the deputies of the sheriff of Montgomery, by virtue of a *fi. fa.* issued against Wood, in favor of the defendants. The deputy sold the whisky on the 23d of March following, and it was bid in by the defendants. It appeared that the sheriff was informed of the levy made under the defendants' *fi. fa.*, before he settled with the plaintiffs for the grain.

The defendants moved for a nonsuit, insisting that the plaintiffs acquired no title to the whisky by their compromise with the sheriff. The circuit judge ordered a nonsuit, and the plaintiffs now moved for a new trial on a bill of exceptions.

S. Wilkeson, Jr., for the plaintiffs.

N. Hill, Jr., for the defendants.

By the Court, NELSON, Ch. J. Even conceding that the settlement with the sheriff for the taking and conversion of the grain was inoperative, (which I should not be willing to admit, if made in good faith,) still, a decisive answer to the defence is, that the identity of the grain was destroyed by the act of manufacturing it into whisky, and the property in the new article vested in the plaintiffs. The doctrine on this subject is stated by Blackstone as follows: "By the Roman law, if any given corporeal substance received afterwards an accession by

natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled by his right of possession to the property of it under such its state of improvement. But if the thing itself, by such operation, was changed into a different species, as by making wine, oil, or bread, out of another's grapes, olives, or wheat, it belonged to the new operator; who was only to make a satisfaction to the former proprietor for the materials which he had so converted. And these doctrines are implicitly copied and adopted by our Bracton, and have since been confirmed by many resolutions of the courts." 2 Bl. Com. 404; and see Bro. Ab. tit. Property, 23; Moore, 20; Poph. 38; Vin. Ab. tit. Trespass, (H. a. 3,) pl. 8; Id. tit. Property (E.) pl. 5; *Betts v. Lee*, 5 Johns. Rep. 348; 2 Kent's Com. 364. The same doctrine was laid down in *Brown v. Sax*, 7 Cowen, 95. The court there said: "The rule, in case of a wrongful taking is, that the taker cannot, by any act of his own, acquire title, unless he either destroy the identity of the thing; as by changing money into a cup, or grain into malt; or annexing it to and making it a part of some other thing, which is the principal; or changing its nature from personal to real property; as where it is worked into a dwelling-house."

In the present case, the nature and species of the commodity was entirely changed and its identity destroyed; as effectually, it seems to me, as by "making wine, oil, or bread, out of another's grapes, olives, or wheat." I think the circuit judge erred in nonsuiting the plaintiffs, and that they are entitled to a new trial. *New trial granted.*

On the second trial it was proved that one Hackney, a deputy of the sheriff of Montgomery county, on the 22d day of March, 1842, by virtue of a *fi. fa.* on a judgment in this court in favor of the defendants, against one Uriah Wood, sold the whiskey in question, being about twelve hundred gallons, and worth \$277.68, he having previously levied upon it; and that upon the sale the defendants became the purchasers, and afterwards converted it to their own use. The whiskey was levied on and sold at the plaintiffs' distillery, and they forbade the sale. The plaintiffs having rested, the defendants offered to prove in their defence that the whiskey was manufactured from corn belonging to Wood, the defendant in the execution; that the plaintiffs had taken the corn and manufactured it into whiskey, without any authority from Wood; and that they knew at the time they took it that it belonged to him. The plaintiffs' counsel objected to this evidence, insisting that Wood's title to the corn was extinguished by the conversion of it into whiskey. The judge sustained the objection and rejected the evidence, and the defendants' counsel excepted. Verdict for the plaintiffs. A motion is now made for a new trial, on a bill of exceptions.

[A majority of the court (BRONSON, C. J., and BEARDSLEY, J.) denied the motion for a new trial, JEWETT, J., dissenting. The opinions are omitted.]

After judgment the defendants brought error to this Court [for the Correction of Errors], where the cause was first argued by Mr. *Hill*, for the plaintiffs in error, and Mr. *Reynolds*, for the defendants in error, in September, 1848. The judges being divided in opinion, a re-argument was ordered, which came on in January last.

N. Hill, Jr., for the plaintiffs in error.

M. T. Reynolds for the defendants in error.

RUGGLES, J. It is an elementary principle in the law of all civilized communities, that no man can be deprived of his property, except by his own voluntary act, or by operation of law. The thief who steals a chattel, or the trespasser who takes it by force, acquires no title by such wrongful taking. The subsequent possession by the thief or the trespasser is a continuing trespass; and if during its continuance, the wrongdoer enhances the value of the chattel by labor and skill bestowed upon it, as by sawing logs into boards, splitting timber into rails, making leather into shoes, or iron into bars, or into a tool, the manufactured article still belongs to the owner of the original material, and he may retake it or recover its improved value in an action for damages. And if the wrongdoer sell the chattel to an honest purchaser having no notice of the fraud by which it was acquired, the purchaser obtains no title from the trespasser, because the trespasser had none to give. The owner of the original material may still retake it in its improved state, or he may recover its improved value. The right to the improved value in damages is a consequence of the continued ownership. It would be absurd to say that the original owner may retake the thing by an action of replevin in its improved state, and yet that he may not, if put to his action of trespass or trover, recover its improved value in damages. Thus far, it is conceded that the common law agrees with the civil.

They agree in another respect, to wit, that if the chattel wrongfully taken, afterwards come into the hands of an *innocent holder* who believing himself to be the owner, converts the chattel into a thing of different species so that its identity is destroyed, the original owner cannot reclaim it. Such a change is said to be wrought when wheat is made into bread, olives into oil, or grapes into wine. In a case of this kind the change in the species of the chattel is not an intentional wrong to the original owner. It is therefore regarded as a destruction or consumption of the original materials, and the true owner is not permitted to trace their identity into the manufactured article, for the purpose of appropriating to his own use the labor and skill of the innocent occupant who wrought the change; but he is put to his action for damages as for a thing consumed, and may recover its value as it was when the conversion or consumption took place.

There is great confusion in the books upon the question what constitutes change of identity. In one case, (5 Hen. 7, fol. 15,) it is said that the owner may reclaim the goods so long as they may be known, or in other words, ascertained by inspection. But this in many cases is

by no means the best evidence of identity; and the examples put by way of illustration serve rather to disprove than to establish the rule. The court say that if grain be made into malt, it can not be reclaimed by the owner because it can not be known. But if cloth be made into a coat, a tree into squared timber, or iron into a tool, it may. Now as to the cases of the coat and the timber they may or may not be capable of identification by the senses merely; and the rule is entirely uncertain in its application; and as to the iron tool, it certainly can not be identified as made of the original material, without other evidence. This illustration, therefore, contradicts the rule. In another case, (Moore's Rep. 20,) trees were made into timber and it was adjudged that the owner of the trees might reclaim the timber, "because the greater part of the substance remained." But if this were the true criterion it would embrace the cases of wheat made into bread, milk into cheese, grain into malt, and others which are put in the books as examples of a change of identity. Other writers say that when the thing is so changed that it can not be reduced from its new form, to its former state, its identity is gone. But this would include many cases in which it has been said by the courts that the identity is not gone; as the case of leather made into a garment, logs into timber or boards, cloth into a coat, &c. There is therefore no definite settled rule on this question; and although the want of such a rule may create embarrassment in a case in which the owner seeks to reclaim his property from the hands of an honest possessor; it presents no difficulty where he seeks to obtain it from the wrongdoer; provided the common law agrees with the civil in the principle applicable to such a case.

The acknowledged principle of the civil law is that a wilful wrongdoer acquires no property in the goods of another, either by the wrongful taking or by any change wrought in them by his labor or skill, however great that change may be. The new product, in its improved state, belongs to the owner of the original materials, provided it be proved to have been made from them; the trespasser loses his labor, and that change which is regarded as a destruction of the goods, or an alteration of their identity in favor of an honest possessor, is not so regarded as between the original owner and a wilful violator of his right of property.

These principles are to be found in the digest of Justinian. (Lib. 10, tit. 4, leg. 12, § 3.) "If any one shall make wine with my grapes, oil with my olives, or garments with my wool, *knowing they are not his own*, he shall be compelled by action to produce the said wine, oil or garments." So in Vinnius' Institutes, tit. 1, pl. 25. "He who knows the material is another's ought to be considered in the same light as if he had made the species in the name of the owner, to whom also he is to be understood to have given his labor."

The same principle is stated by Puffendorf in his Law of Nature and of Nations, (b. 4, ch. 7, § 10) and in Wood's Institutes of the Civil Law, p. 92, which are cited at large in the opinion of Jewett J. delivered in

this case in the Supreme Court. (4 Denio, 338,) and which it is unnecessary here to repeat. In Brown's Civil and Admiralty Law, p. 240, the writer states the civil law to be that the original owner of any thing improved by the act of another, retained his ownership in the thing so improved, unless it was changed into a different species; as if his grapes were made into wine, the wine belonged to the maker, who was only obliged to pay the owner for the value of his grapes. The species however must be incapable of being restored to its ancient form; *and the materials must have been taken in ignorance of their being the property of another.*

But it was thought in the court below that this doctrine had never been adopted into the common law, either in England or here; and the distinction between a wilful and an involuntary wrongdoer hereinbefore mentioned, was rejected not only on that ground but also because the rule was supposed to be too harsh and rigorous against the wrongdoer.

It is true that no case has been found in the English books in which that distinction has been expressly recognized; but it is equally true that in no case until the present has it been repudiated or denied. The common law on this subject was evidently borrowed from the Roman at an early day; and at a period when the common law furnished no rule whatever in a case of this kind. Bracton, in his treatise compiled in the reign of Henry III., adopted a portion of Justinian's Institutes on this subject without noticing the distinction; and Blackstone, in his Commentaries, vol. 2, p. 404, in stating what the Roman law was, follows Bracton, but neither of these writers intimate that on the point in question there is any difference between the civil and the common law. The authorities referred to by Blackstone in support of his text are three only. The first in Brooks' Abridgment, tit. *Property* 23, is the case from the Year Book, 5 H. 7, fol. 15, (translated in a note to 4 Denio, 335,) in which the owner of leather brought trespass for taking slippers and boots, and the defendant pleaded that he was the owner of the leather and bailed it to J. S. who gave it to the plaintiff, who manufactured it into slippers and boots, and the defendant took them as he lawfully might. The plea was held good and the title of the owner of the leather unchanged. The second reference is to a case in Sir Francis Moore's Reports, p. 20, in which the action was trespass for taking timber, and the defendant justified on the ground that A entered on his land and cut down trees and made timber thereof, and carried it to the place where the trespass was alledged to have been committed, and afterwards gave it to the plaintiff, and that the defendant therefore took the timber as he lawfully might. In these cases the chattels had passed from the hands of the original trespasser into the hands of a third person; in both it was held that the title of the original owner was unchanged, and that he had a right to the property in its improved state against the third person in possession. They are in conformity with the rule of the civil law; and certainly fail to prove any difference between the civil and the common law on the point in question. The

third case cited is from Popham's Reports, p. 38, and was a case of confusion of goods. The plaintiff voluntarily mixed his own hay with the hay of the defendant, who carried the whole away, for which he was sued in trespass; and it was adjudged that the whole should go to the defendant; and Blackstone refers to this case in support of his text, that "our law to guard against fraud gives the entire property, without any account to him whose original dominion is invaded and endeavored to be rendered uncertain without his own consent." The civil law in such a case would have required him who retained the whole of the mingled goods to account to the other for his share, (Just. Inst. lib. 2, tit. 1, § 28;) and the common law in this particular appears to be more rigorous than the civil; and there is no good reason why it should be less so in a case like that now in hand, where the necessity of guarding against fraud is even greater than in the case of a mingling of goods, because the cases are likely to be of more frequent occurrence. Even this liability to account to him whose conduct is fraudulent, seems by the civil law to be limited to cases in which the goods are of such a nature that they may be divided into shares or portions, according to the original right of the parties; for by that law if A obtain by fraud the parchment of B, and write upon it a poem, or wrongfully take his tablet and paint thereon a picture, B is entitled to the written parchment and to the painted tablet, without accounting for the value of the writing or of the picture. (Just. Inst. lib. 2, tit. 1, §§ 23, 24.) Neither Bracton nor Blackstone have pointed out any difference except in the case of confusion of goods between the common law and the Roman, from which on this subject our law has mainly derived its principles.

So long as property wrongfully taken retains its original form and substance, or may be reduced to its original materials, it belongs, according to the admitted principles of the common law, to the original owner, without reference to the degree of improvement, or the additional value given to it by the labor of the wrongdoer. Nay more, this rule holds good against an innocent purchaser from the wrongdoer, although its value be increased an hundred fold by the labor of the purchaser. This is a necessary consequence of the continuance of the original ownership.

There is no satisfactory reason why the wrongful conversion of the original materials into an article of a different name or a different species should work a transfer of the title from the true owner to the trespasser, provided the real identity of the thing can be traced by evidence. The difficulty of proving the identity is not a good reason. It relates merely to the convenience of the remedy, and not at all to the right. There is no more difficulty or uncertainty in proving that the whisky in question was made of Wood's corn, than there would have been in proving that the plaintiff had made a cup of his gold, or a tool of his iron; and yet in those instances, according to the English cases, the proof would have been unobjectionable. In all cases where the new product can not be identified by mere inspection, the original material

must be traced by the testimony of witnesses from hand to hand through the process of transformation.

Again. The court below seem to have rejected the rule of the civil law applicable to this case, and to have adopted a principle not heretofore known to the common law; and for the reason that the rule of the civil law was too rigorous upon the wrongdoer, in depriving him of the benefit of his labor bestowed upon the goods wrongfully taken. But we think the civil law in this respect is in conformity not only with plain principles of morality, but supported by cogent reasons of public policy; while the rule adopted by the court below leads to the absurdity of treating the wilful trespasser with greater kindness and mercy than it shows to the innocent possessor of another man's goods. A single example may suffice to prove this to be so. A trespasser takes a quantity of iron ore belonging to another and converts it into iron, thus changing the species and identity of the article: the owner of the ore may recover its value, in trover or trespass; but not the value of the iron, because under the rule of the court below it would be unjust and rigorous to deprive the trespasser of the value of his labor in the transmutation. But if the same trespasser steals the iron and sells it to an innocent purchaser, who works it into cutlery, the owner of the iron may recover of the purchaser the value of the cutlery, because by this process the original material is not destroyed, but remains, and may be reduced to its former state; and according to the rule adopted by the court below as to the change of identity the original ownership remains. Thus the innocent purchaser is deprived of the value of his labor, while the guilty trespasser is not.

The rule adopted by the court below seems, therefore, to be objectionable, because it operates unequally and unjustly. It not only divests the true owner of his title, without his consent; but it obliterates the distinction maintained by the civil law, and as we think by the common law, between the guilty and the innocent; and abolishes a salutary check against violence and fraud upon the rights of property.

We think, moreover, that the law on this subject has been settled by judicial decisions in this country. In *Betts v. Lee*, 5 John. 349, it was decided that as against a trespasser the original owner of the property may seize it in its new shape, whatever alteration of form it may have undergone, if he can prove the identity of the original materials. That was a case in which the defendant had cut down the plaintiff's trees, and made them into shingles. The property could neither be identified by inspection, nor restored to its original form; but the plaintiff recovered the value of the shingles. So in *Curtis v. Groat*, 6 John. 169, a trespasser cut wood on another's land and converted it into charcoal. It was held that the charcoal still belonged to the owner of the wood. Here was a change of the wood into an article of different kind and species. No part of the substance of the wood remained in its original state; its identity could not be ascertained by the senses, nor could it be restored to what it originally was. That

case distinctly recognizes the principle that a wilful trespasser can not acquire a title to property merely by changing it from one species to another. And the late Chancellor Kent, in his Commentaries, (Vol. 2, p. 363,) declares that the English law will not allow one man to gain a title to the property of another upon the principle of accession, if he took the other's property wilfully as a trespasser: and that it was settled as early as the time of the Year Books, that whatever alteration of form any property had undergone, the owner might seize it in its new shape, if he could prove the identity of the original materials.

The same rule has been adopted in Pennsylvania. *Snyder v. Vaux*, 2 Rawle, 427. And in Maine and Massachusetts it has been applied to a wilful intermixture of goods. *Ryder v. Hathaway*, 21 Pick. 304, 5; *Wingate v. Smith*, 7 Shep. 287; *Willard v. Rice*, 11 Metc. 493.

We are therefore of opinion that if the plaintiffs below in converting the corn into whisky knew that it belonged to Wood, and that they were thus using it in violation of his right, they acquired no title to the manufactured article, which although changed from the original material into another of different nature, yet being the actual product of the corn, still belonged to Wood. The evidence offered by the defendants and rejected by the circuit judge ought to have been admitted.

The right of Wood's creditors to seize the whisky by their execution is a necessary consequence of Wood's ownership. Their right is paramount to his, and of course to his election to sue in trover or trespass for the corn.

The judgment of the Supreme Court should be reversed and a new trial ordered.

GARDINER, JEWETT, HURLBUT, and PRATT, JJ., concurred.

BRONSON, Ch. J. Two very able arguments here, against the opinion which I delivered when the case was before the Supreme Court, (4 Denio, 332,) have only served to confirm me in the conclusion at which I then arrived. I shall add but little now to what I said on the former occasion.

The owner may, as a general rule, follow and retake the property of which he has been wrongfully deprived so long as the same thing remains, though it may have been changed in form and value by the labor and skill of the wrong-doer. But when, as in this case, the identity of the thing has been destroyed by a chemical process, so that the senses can no longer take cognizance of it—when it has not only changed its form and appearance, but has so combined with other elements that it has ceased to be the same thing, and become something else, the owner can, I think, follow it no longer: his remedy is an action for damages. Such I take to be the rule of the common law; and that is our law.

The rule for which the defendants contend, that in the case of a wilful trespass, the owner may follow and retake his property after it

has been changed into a thing of a different species—that he may trace corn into whisky, and take the new product—is open to several objections. First: it would be nearly or quite impossible to administer such a rule in trials by jury. Second: the rule would often work injustice, by going beyond the proper measure of either redress or punishment; while an action for damages would render exact justice to both parties. It is very true that a wilful trespasser should be punished: but that proves nothing. All agree that he should be made to suffer; but the mode and measure of punishment are questions which still remain. If one has knowingly taken six pence worth of his neighbor's goods as a trespasser, he should neither be imprisoned for life, nor should he forfeit a thousand dollars. We should not lose sight of the fact, that the rule now to be established is one for future, as well as present use; and it may work much greater injustice in other cases than it can in this. Third: there is no authority at the common law for following and retaking the new product in a case like this. I make the remark with the more confidence, because the very diligent counsel for the defendants, after having had several years, pending this controversy, for research, has only been able to produce some *dicta* of a single jurist, without so much as one common law adjudication in support of the rule for which he contends. He is driven to the civil law; and then the argument is, that because we, in common with the civilians, allow the owner to retake his property in certain cases, we must be deemed to have adopted the rule of the civil law on this subject in its whole extent. But that is a *non sequitur*. It often happens that our laws and those of the Romans—and, indeed, of all civilized nations—are found to agree in some particulars, while they are widely different in others; and this is true of laws relating to a single subject. There is no force, therefore, in the argument, that because our law touching this matter is to some extent like the civil law, it may be presumed that the two systems are alike in every particular. And clearly, the burden of showing that the Roman law is our law, lies on those who affirm that fact. There is not only the absence of any common law adjudication in favor of the rule for which the defendants contend, but in one of the earliest cases on the subject to be found in our books, (Year Book, 5 H. 7, fo. 15, 4 Denio, 335, note,) the court plainly recognized the distinction which has been mentioned, and admitted that the owner could not retake the property after its identity had been destroyed; and “grain taken and malt made of it” was given as an example.

There are many cases where the title to a personal chattel may be turned into a mere right of action, without the consent of the owner, although the thing was taken by a wilful trespasser, or even by a thief. If a man steal a piece of timber, and place it as a beam or rafter in his house; or a nail, and drive it into his ship; or paint, and put it upon his carriage, the owner can not retake his goods, but is put to his action for damages; and this is so in the civil, as well as at the common law. If a thief take water from another's cistern, and use it in making beer;

or salt, and use it in pickling pork; or fuel, and use it in smoking hams, I suppose no one will say, that the owner of the water, the salt, or the fuel may seize the beer, the pork or the hams. And there is no better reason for giving him the new product, where sand is made into glass, malt into beer, coal into gas, or grain into whisky. In the case now before us, the civilians would not go so far as to say, that the owner of the grain might take the swine which were fattened on the refuse of the grain after it had gone through the process of distillation. And yet that would hardly be more unjust or absurd than it would be to give him the whisky. There must be a limit somewhere; and I know of none which is more safe, practical and just than that which allows the owner to follow a chattel until it has either been changed into a different species, or been adjoined to something else, which is the principal thing; and stops there. Thus far our courts have gone, and there they have stopped. We have neither precedent nor reason in favor of taking another step; and I can not take it.

Judge HARRIS agrees with me in the opinion that the judgment of the Supreme Court is right, and should be affirmed.

TAYLOR, J. did not hear the argument, and gave no opinion.

*Judgment reversed.*¹

PULCIFER v. PAGE.

SUPREME COURT OF MAINE. 1851.

[Reported 32 Me. 404.]

TRESPASS for an iron chain, which each of the parties claimed to own.

The evidence tended to show, that each of the parties had a chain; — that each chain had been broken into several pieces; that the plaintiff, without the consent or knowledge of the defendant, carried all the pieces to a blacksmith, and had them made up into two chains; — and that the defendant carried away one of them into which some part of his own chain had been incorporated. It was for this chain, that this suit is brought.

The judge instructed the jury that if the plaintiff had only incorporated into this chain some small portion of the defendant's chain without his consent, not exceeding two or three links, it would not thereby become the property of the defendant. To this ruling the defendant excepted.

Woodman, for the defendant.

Goodwin, for the plaintiff.

¹ See *Gaskins v. Davis*, 115 N. C. 85.

HOWARD, J. This case presents a question of acquisition of property by accession, but does not involve an inquiry concerning the admixture or confusion of goods. It is a general rule of law, that if the materials of one person are united to the materials of another, by labor, forming a joint product, the owner of the principal materials will acquire the right of property in the whole, by right of accession. This was a rule of the Roman, and of the English law, and has been adopted, as it is understood, in the United States, generally. Dig. 6, 1, 61; *Bracton de acq. rerum dom.* B. 2, c. 2, § 3, 4; Molloy, B. 2, c. 1, § 7; Pothier, *Trait du droit de propriété*, L. 1, c. 2, art. 3, No. 169-180; 2 Black. Com. 404; 1 Bro. Civil Law, 241; *Glover v. Austin*, 6 Pick. 209; *Sumner v. Hamlet*, 12 Pick. 83; *Merritt v. Johnson*, 7 Johns. 474; 2 Kent's Com. 361.

The distinctions and qualifications, that may be appropriate and necessary in the application of this doctrine to a variety of cases that may arise, do not require consideration, in determining this case. The first instruction stated was favorable to the defendant, and forms no ground of exceptions for him; and the plaintiff does not complain of it. The second instruction, that "if the plaintiff had only incorporated into this chain some small portion of the defendant's chain, without his consent, not exceeding two or three links, the chain would not by the incorporation of such small portion, become the property of the defendant," is understood to be in accordance with the rule of law before mentioned, and is not erroneous.

Exceptions overruled, judgment on the verdict.

WEYMOUTH v. CHICAGO & NORTH-WESTERN RAILWAY COMPANY.

SUPREME COURT OF WISCONSIN. 1863.

[*Reported 17 Wis. 550.*]

APPEAL from the Circuit Court for Jefferson County.

The plaintiff, a married woman, brought this action to recover damages for the conversion of seventy-one cords of wood belonging to her. The facts are stated sufficiently in the opinion of the court. Verdict for the plaintiff for \$417 damages. Motion for a new trial overruled. Judgment upon the verdict; from which the defendant appealed.

Enos & Hall, for appellant.

D. F. Weymouth, for respondent.

By the court, PAINE, J.¹ The only remaining question is as to the rule of damages. The facts material to this are as follows: The plaintiff had caused the wood to be cut, and had piled it on the premises

¹ Part of the case relating to another point is omitted.

of the defendant, in the town of Farmington in Jefferson county, with a view of selling it to the defendant. The complaint shows that at that place it was worth about one dollar and fifty cents per cord. Before the contract of sale was completed, the defendant, by mistake, carried the wood to Janesville, and there mingled it with other wood in such a manner that its identity was lost. The plaintiff then demanded it at Janesville, and the defendant did not deliver it. Wood at that time was worth four dollars per cord in Janesville, and was afterwards worth five. The question is, whether the plaintiff should recover its value at Janesville, or only the value at Farmington, where it was first taken.

There are cases which would seem to sustain the right of the plaintiff to recover the value at Janesville, although the increase in value arose solely from the labor of the defendant in transporting it to that place. In the case of *Walther v. Wetmore*, 1 E. D. Smith, 28, the following are cited as sustaining such a rule: *Curtis v. Grant*, 6 Johns. 168; *Babcock v. Gill*, 10 id. 287; *Brown v. Sax*, 7 Cow. 95; *Baker v. Wheeler*, 8 Wend. 505.

I do not think that all of them sustain it. Thus in the case of *Babcock v. Gill*, the plaintiff had employed one Howard to manufacture black salts, which the plaintiff furnished, into pearl ashes. Howard was already indebted to the plaintiff, and his labor was to be applied in payment of the indebtedness. He manufactured the pearl ashes, and they were afterwards converted. The court very properly held that the plaintiff might recover their value, inasmuch as Howard was only the agent of the plaintiff in doing the work. He would still have been entitled to credit for his labor, on his indebtedness to the plaintiff. So that the question was a very different one from that presented here.

In *Curtis v. Grant* the plaintiff had trespassed upon the defendant's land and manufactured his timber into coal, which remained, however, in the defendant's possession. The trespasser then sued the owner of the land for the coal, and it was held that he had no cause of action, for the coal belonged to the owner of the timber out of which it was made. This was undoubtedly correct. For it is conceded by all the cases that a wrongdoer cannot, by bestowing labor upon the property of another, which he has tortiously taken, thereby divest the title of the original owner, but the latter may retake it in whatever form, so long as its identity can be established. But it seems to me that although the owner's right of recaption has been thus settled, it does not necessarily follow that, if he voluntarily waives that right and sues for damages, he should recover, in all cases, the full value of the property at any time when he might have retaken it, though a large portion of such value had been given it by the labor of the defendant. The difficulties which exist in the former case, preventing any other rule than the one adopted, do not exist in the latter.

In determining the question of recaption, the law must either allow the owner to retake the property, or it must hold that he has lost his

right by the wrongful act of another. If retaken at all, it must be taken as it is found, though enhanced in value by the trespasser. It cannot be restored to its original condition. The law, therefore, being obliged to say either that the wrongdoer shall lose his labor, or the owner lose the right to take his property wherever he may find it, very properly decides in favor of the latter.

But where the owner voluntarily waives the right to reclaim the property itself, and sues for the damages, the difficulty of separating the enhanced value from the original value no longer exists. It is then entirely practicable to give the owner the entire value that was taken from him, which certainly seems to be all that natural justice requires, without adding to it such value as the property may have afterwards acquired from the labor of the defendant. In the case of recaption, the law does not allow it because it is absolute justice that the original owner should have the additional value, but because the wrongdoer has by his own act created a state of facts where either he or the owner must lose something. There the law says the wrongdoer shall lose. But if the owner chooses to resort to another remedy, in applying which the law may give him full compensation for all that he has lost, without compelling the wrongdoer to pay more, I see no reason why that should not be the rule. The value of the property at the moment of conversion, with such increase as it may have received from fluctuations of the market, or other causes independent of the acts of the defendant, should be the measure of damages.

If there is any force in these considerations, those cases which have assumed that the measure of damages should in all such instances include the enhanced value of the property, merely because the owner might have retaken it, ought not to be followed.

In one of those cases, *Brown v. Sax*, 7 Cow. 95, Justice Sutherland delivered a dissenting opinion, which certainly presents some very strong reasons against the rule adopted by the court. And his views are sustained by the following cases: *Cushing v. Longfellow*, 26 Maine, 310; *Moody v. Whitney and others*, 38 id. 174; *Forsyth v. Wells*, 41 Pa. St. 291; *Morgan v. Powell*, 43 E. C. L. 734. It is true that two of these cases were actions of trespass, and that they contain intimations that the owner might have demanded the property in its improved condition, and then recovered its value in that condition. But *Moody v. Whitney et al.* and *Forsyth v. Wells* were actions of trover, and reject such a distinction, and hold that in trover, at least where the property was taken by mistake, the rule of damages should be the same as in trespass — that is, the value where first taken.

We have concluded to follow that rule, the facts in this case showing that the property was taken by mistake, and therefore not requiring us to go any farther. But I will also add that, in my opinion, it is immaterial whether the property is taken by mistake or intentionally, unless in the latter case the taking is of such a character as to make the doctrine of exemplary damages applicable. It is not every intentional

trespass or conversion that makes a case for exemplary damages. If a man takes a tree from my land by mistake, I am damaged just as much as though he took it intentionally; and if in case of mistake I ought to recover only the value of the tree, although he may have manufactured it into costly furniture, for the reason that the value of the tree is all that I have lost, then the fact that he took it knowing it to be mine ought not to vary the rule of damages, for the plain reason that my loss is the same in one case as the other.

It follows from our conclusion on this point, that the court should have given the fourth instruction asked by the defendant, that the value of the wood at Farmington, where it was first taken, with interest, constituted the measure of damages.

For this reason the judgment must be reversed, and a new trial ordered.¹

SINGLE v. SCHNEIDER AND ANOTHER.

SUPREME COURT OF WISCONSIN. 1869.

[*Reported 24 Wis. 299.*]

APPEAL from the Circuit Court for Marathon County.

Replevin for lumber. The facts are stated in the opinion. The defendants regained possession of the property from the officer, in the manner provided by the statute. Verdict for the plaintiff; and defendants moved to set it aside, as against the law and the evidence; but the motion was denied. On plaintiff's motion, judgment was rendered in his favor for the value of the property, as found by the verdict. From this judgment, defendants appealed.

W. C. Silverthorn (with *A. B. Braley*, of counsel), for appellants.
G. L. Park, for respondent.

PAINE, J. This action was brought to recover possession of certain lumber, which it was claimed had been manufactured from logs cut without authority upon the plaintiff's land. There was evidence tending to show that the defendants, who owned land adjoining the plaintiff's, got over the line by mistake. And there was also some evidence tending to show that they cut some on the plaintiff's land, after they were notified of the mistake. There was also an offer of a tax deed in evidence, which was rejected; and the plaintiff's affidavit shows that the defendants claimed title to the property under this tax deed. There was some talk between the parties about the defendants settling with the plaintiff for what they had cut; but this does not seem to have been done. Nor did the plaintiff take any steps to recover the logs, but marked them and kept watch of them at the mills until they were sawed and rafted, and then brought this action to recover the lumber. The

¹ See *Everson v. Seller*, 105 Ind. 266; *Forsyth v. Wells*, 41 Pa. 291.

defendants gave an undertaking under the statute, and retained the property. The jury found for the plaintiff, and assessed the value of the property at the entire value of the lumber as it was proved to have been at the time of commencing this suit.

The material and interesting question in the case is, whether, assuming the logs to have been cut on the plaintiff's land, he ought to recover the entire value of the lumber, without any deduction for the labor of the defendants in cutting, hauling, and manufacturing the logs into the lumber.

If the action had been for the trespass or conversion, he could only have recovered the value of the timber at the time it was taken, at least if it was taken by mistake. *Weymouth v. The Ch. & N. W. R. R. Co.*, 17 Wis. 550. And, upon the evidence and the whole record, I think these defendants stand in as favorable a position as though it were conceded that the logs were taken by mistake. There is proof tending to show a mistake as to a part; and it appears, also, from the plaintiff's affidavit, that they claimed title to the land. They are not to be regarded, therefore, as wilful trespassers. Upon these facts, it seems contrary to the dictates of natural justice, that the plaintiff should be allowed to wait quietly until the defendants had manufactured the logs into lumber, enhancing their value four or five fold, and then recover against them that entire value. True, it is generally recognized that a wrongdoer cannot, by changing the form of another's property, change the title. The owner may pursue it, and reclaim it specifically by whatever remedy the law gives him for that purpose. If he gets it, it is his. But the apparent injustice of allowing one to thus avail himself of the labor and money of another, in cases similar to this, has led to a modification of this stringent rule of ownership, wherever the question is resolved into one of mere compensation in money for whatever injury the party may have suffered. This modification has thus far been developed almost entirely in actions of trespass or trover, like that of *Weymouth v. Ch. & N. W. R. R. Co.*, and the cases therein referred to. But, in the recent case of *Herdic v. Young*, 55 Pa. St. 176, the supreme court of Pennsylvania applied the same rule in an action of replevin. They there held that, inasmuch as the law gave the defendant the power to retain the property by giving a bond, whenever he availed himself of that right, the question became then one of damages merely, and that the form of action ought not to produce a difference in the result. The damages to be recovered should be the same as though the action were trespass. This case seems to us so well adapted to the promotion of justice and the prevention of injustice, that we have concluded to follow it. To apply that rule here would have required the value of the property to have been assessed at the full value of the lumber, deducting the expense of all that the defendants had done upon it down to the time the suit was begun. As remarked by the court in that case: "Such a standard of damages, growing out of the nature of the act and the form of the action, is reasonable, and does justice to

both parties. It saves to the otherwise innocent defendant his labor and money, and gives to the owner the enhancement of the value of his property growing out of other circumstances, such as a rise in the market price, a difference in price between localities, and other adventitious causes." Our statute provides that the jury shall assess the value of the property. But that is merely as the basis of recovery in case a delivery cannot be had. The intent was, to fix the value that the plaintiff was entitled to recover. Thus, in case of a lien or other special interest, the value to be fixed would be the amount of that lien or interest. *Booth v. Ableman*, 20 Wis. 21. And although, in strict law, the plaintiff is the general owner of the property, yet, when it is once settled that he ought not to recover the value it has received from the defendant's labor, the application of the rule would seem to place him upon substantially the same footing with the owner of a special interest, so far as ascertaining the value is concerned. Perhaps the best way in such a case would be, to direct the jury to find the actual entire value of the property, and to find specially the amount to which its value had been enhanced by the defendant's labor. And then, in case of judgment for the plaintiff, it would be in the alternative, for a delivery, or, if that could not be had, for the amount of the difference between the two sums thus found.

It is quite probable that this question was not distinctly presented to the court below. But it seems to be fairly raised by the motion for a new trial, on the ground that the verdict was against the law and the evidence; and that motion ought to have been granted.

For this reason the judgment must be reversed, and the cause remanded for a new trial.

By the Court. — Ordered accordingly.¹

SINGLE v. SCHNEIDER

SUPREME COURT OF WISCONSIN. 1872.

[Reported 30 Wis. 570.]

APPEAL from the Circuit Court for Winnebago County.

Replevin for lumber. The facts appear in the opinion, and in the former report of the same case, 24 Wis. 299. The jury found for the plaintiff, and found that 58,000 feet of the logs were cut by defendants in good faith, by mistake, and 59,350 feet were cut wilfully and not by mistake. A motion for a new trial being overruled, defendants appealed from the judgment.

Felker & Weisbrod, for appellant.

G. L. Park and *D. Lloyd Jones*, contra.

¹ See *State v. Shevlin-Carpenter Co.*, 62 Minn. 99.

COLE, J. This case has been before this court at a previous term, and will be found reported in the 24 Wis. 299. The facts as developed on the second trial were substantially the same as are the first. Among other things, the court charged, in respect to the rule of damages, as follows: "When a person cuts logs upon the land of another, without a lawful right so to do, but in good faith, believing that he has the right to, he is entitled to have deducted from the value of the property replevied, such cost and expense and labor as he has bestowed upon the property to get it into its enhanced value. But on the other hand, if knowingly and wilfully, without color or claim of right, he cuts logs upon the land of another, the owner is entitled to recover the enhanced value of the property in whatever shape he may put it, provided he reclaims the specific property."

The sole question in the case arises upon the last paragraph of this charge, which was excepted to on the trial. The jury found under this charge that 58 M. feet of the logs were cut by the defendants in good faith by mistake, and that a little over 59 M. feet were cut wilfully and not by mistake; and the plaintiff had judgment for the improved value of the property on that quantity.

The counsel for the defendant contends that, so far as the measure of damages is concerned, it is quite immaterial whether the logs were cut intentionally or through mistake — that the damages given in law as compensation for an injury should be precisely commensurate with the injury, neither more nor less; and that the plaintiff is not entitled to recover the value of the property in its improved state, under the circumstances of this case. He concedes that, if there was anything tending to show that the trespass was wanton or malicious — committed under circumstances of insult or aggravation, then, upon the authorities, exemplary damages might be allowed in the discretion of the jury, which might exceed or fall below the value of the property enhanced by the labor of the defendants. But he claims that when a person, though intentionally, cuts pine logs upon the wild, unoccupied land of another, to say, as a matter of right, the owner shall recover the enhanced value of the property manufactured into lumber, or into the most expensive furniture, is a rule contrary to the principles of natural justice, and not in accordance with the doctrine of the common law.

We are inclined to adopt this view of the matter, although we are well aware that by so doing we lay down a rule in conflict with some adjudications, which may be found. But it seems to us that, if the owner is entirely indemnified for the injury he has sustained, it is quite immaterial whether the logs were cut by mistake or intentionally, unless in the latter case the trespass was of such a character as to make the doctrine of exemplary damages applicable. This was the view expressed by Mr. Justice Paine in *Weymouth v. Chicago & Northwestern R. R. Co.*, 17 Wis. 550, 555; and it seems to us that it is consonant with sound principle and natural justice. It is true, that was an action

of trover, and this is an action of replevin. But here the defendants gave the undertaking under the statute, and retained possession of the property. The judgment was in the alternative, for the delivery of the property to the plaintiff in case delivery could be had, or for its value. The plaintiff does not really expect to recover the specific property, and therefore there is no valid reason for a distinction between this case and that of trover, as regards the rule of damages; it should be the same in both cases. And consequently, whether the logs were cut by mistake or intentionally is immaterial as affecting the amount of the recovery, unless the element of exemplary damages enters into the case, which is not contended for by the counsel for the plaintiff. But he insists that it is the settled rule of the common law in the case of a voluntary trespass, that the owner may retake the property in its improved state, or recover its enhanced value, so long as its identity remains.

This was the great question discussed in the celebrated case of *Silsbury v. McCoon*, reported in 6 Hill, 425, 4 Denio, 332, and 3 N. Y. 379. The question in that case was, whether, if one wrongfully took another's grain and manufactured it into whisky, the property was changed by the process of manufacture into a different species of property, so that it could not be retaken by the former owner in its changed or improved condition. The case was argued by the most eminent counsel—twice in the court of appeals—and underwent a most thorough examination by the judges, who were divided in opinion, both in the Supreme Court and the court of last resort. Bronson, Ch. J., who delivered the prevailing opinion when the cause was before the Supreme Court the second time, and also delivered a dissenting opinion in the court of appeals, while willing to concede for the purposes of that case the correctness of the rule that if one wrongfully take the chattel of another, and merely change its form and value by bestowing his labor and skill upon it without destroying its identity, the original proprietor might either retake the property, or recover its value in its state of improvement, yet he did not wish to be understood as admitting this to be the proper rule. As an original question, he thought the owner should either reclaim the property before the new possessor has greatly increased its value, either by bestowing his labor and skill upon it, or by joining it to other materials of his own; or else that he should be restricted to a remedy by action for damages which he has sustained. The majority, however, of the court of appeals held to the doctrine that one man could not gain any title to the property of another upon the principle of accession, if he took the other's property wilfully as a trespasser, though he might, by his skill and labor, increase its value a thousand fold. But it seems to us, to allow the owner to appropriate the labor of the wrongdoer in this way is an unjust measure of redress. For, as remarked by Ch. J. Bronson, "the question is not, as it has been sometimes artfully put, whether the common law will allow the owner to be unjustly deprived of his

property, or will give encouragement to a wilful trespasser. It will do neither. But, in protecting the owner and punishing the wrongdoer, our law gives such rules as are capable of practical application, and are best calculated to render exact justice to both parties. The proper inquiry is, in what matter and to what extent should the trespasser be punished; and what should be the kind and measure of redress to the injured party? A trespasser who takes iron ore and converts it into watch springs, by which its value is increased a thousand fold, should not be hanged, nor should he lose the whole of the new product. Either punishment would be too great. Nor should the owner of the ore have the watch springs, for it would be more than a just measure of redress." 4 Denio, p. 336.

So, in the case before us, the rule seems rigorous and unnecessarily severe, which says the defendants must lose all their labor bestowed upon the logs, providing they knew at the time they cut them that they did not own the land. Let the plaintiff have full compensation for the trespass, which ordinarily is the value of the stumpage. *Hungerford v. Redford*, 29 Wis. But it is inconsistent, as it appears to us, with the general principles and policy of the law, to allow the plaintiff to recover the value of the logs manufactured into lumber. He waited until this was done, and now seeks to secure for himself the labor and expense of another. And he invokes the aid of the principle that a wilful trespasser can acquire no title or rights in the property of another, however much he may have added to its value by his labor and workmanship. There were no circumstances of fraud, malice or wanton injury attending the trespass, and the value of the logs cut — or, as it is sometimes called, the value of the stumpage — would seem to be the measure of just compensation. In this case that is readily ascertained from the verdict of the jury. The plaintiff must remit the value of the labor bestowed upon 59,350 feet of logs as found by the jury, or there must be a new trial.

By the Court — Ordered accordingly.¹

WETHERBEE v. GREEN.

SUPREME COURT OF MICHIGAN. 1871.

[Reported 22 Mich. 311.]

ERROR to Bay Circuit.

This was an action of replevin, brought by George Green, Charles H. Camp and George Brooks, in the Circuit Court for the county of Bay, against George Wetherbee, for one hundred and fifty-eight thousand black ash barrel hoops, alleged to be of the value of eight hundred

¹ See *Tuttle v. Wilson*, 52 Wis. 643.

dollars. The hoops were cut upon a tract of land which Green, one of the plaintiffs, and one Thomas Sumner had owned as tenants in common. Green, by parol, had authorized Sumner to sell timber from off the land. Afterwards, Sumner being indebted to Camp and Brooks, the other plaintiffs, conveyed to them, by warranty deed, his undivided half of the land, they agreeing orally to re-convey upon payment. Sumner after his conveyance to Camp and Brooks, sold a quantity of timber growing upon the land to Wetherbee, who cut and manufactured the same into hoops, — for the possession of which this action is brought.

On the trial, the circuit judge excluded the testimony offered by the defendant, to show the character of the transaction between Sumner and Camp and Brooks, and the license derived from Sumner to cut the timber; and under the charge of the court the jury found for plaintiffs. The judgment entered upon the verdict comes into this court by writ of error.

Marston and Hatch, for plaintiff in error.

Clark and Day, for defendants in error.

COOLEY, J. The defendants in error replevied of Wetherbee a quantity of hoops, which he had made from timber cut upon their land. Wetherbee defended the replevin suit on two grounds. First, he claimed to have cut the timber under a license from one Sumner, who was formerly tenant in common of the land with Green, and had been authorized by Green to give such license. Before the license was given, however, Sumner had sold his interest in the land to Camp and Brooks, the co-plaintiffs with Green, and had conveyed the same by warranty deed; but Wetherbee claimed and offered to show by parol evidence, that the sole purpose of this conveyance was to secure a pre-existing debt from Sumner to Camp and Brooks, and that consequently it amounted to a mortgage only, leaving in Sumner, under our statute, the usual right of a mortgagor to occupy and control the land until foreclosure. He also claimed that the authority given by Green to Sumner had never been revoked, and that consequently the license given would be good against Green, and constitute an effectual bar to the suit in replevin, which must fail if any one of the plaintiffs was precluded from maintaining it.

But if the court should be against him on this branch of the case, Wetherbee claimed further that replevin could not be maintained for the hoops, because he had cut the timber in good faith, relying upon a permission which he supposed proceeded from the parties having lawful right to give it, and had, by the expenditure of his labor and money, converted the trees into chattels immensely more valuable than they were as they stood in the forest, and thereby he had made such chattels his own. And he offered to show that the standing timber was worth twenty-five dollars only, while the hoops replevied were shown by the evidence to be worth near seven hundred dollars; also, that at the time of obtaining the license from Sumner he had no knowledge of

the sale of Sumner's interest, but, on the other hand, had obtained an abstract of the title to the premises from a firm of land agents at the county seat, who kept an abstract book of titles to land in that county, which abstract showed the title to be in Green and Sumner, and that he then purchased the timber, relying upon the abstract, and upon Sumner's statement that he was authorized by Green to make the sale. The evidence offered to establish these facts was rejected by the court, and the plaintiffs obtained judgment.

The principal question which, from this statement, appears to be presented by the record, may be stated thus: Has a party who has taken the property of another in good faith, and in reliance upon a supposed right, without intention to commit wrong, and by the expenditure of his money or labor, worked upon it so great a transformation as that which this timber underwent in being transformed from standing trees into hoops, acquired such a property therein that it cannot be followed into his hands and reclaimed by the owner of the trees in its improved condition?

The objections to allowing the owner of the trees to reclaim the property under such circumstances are, that it visits the involuntary wrong-doer too severely for his unintentional trespass, and at the same time compensates the owner beyond all reason for the injury he has sustained. In the redress of private injuries the law aims not so much to punish the wrong-doer as to compensate the sufferer for his injuries; and the cases in which it goes farther and inflicts punitive or vindictive penalties are those in which the wrong-doer has committed the wrong recklessly, wilfully, or maliciously, and under circumstances presenting elements of aggravation. Where vicious motive or reckless disregard of right are not involved, to inflict upon a person who has taken the property of another, a penalty equal to twenty or thirty times its value, and to compensate the owner in a proportion equally enormous, is so opposed to all legal idea of justice and right and to the rules which regulate the recovery of damages generally, that if permitted by the law at all, it must stand out as an anomaly and must rest upon peculiar reasons.

As a general rule, one whose property has been appropriated by another without authority has a right to follow it and recover the possession from any one who may have received it; and if, in the meantime, it has been increased in value by the addition of labor or money, the owner may, nevertheless, reclaim it, provided there has been no destruction of substantial identity. So far the authorities are agreed. A man cannot generally be deprived of his property except by his own voluntary act or by operation of law; and if unauthorized parties have bestowed expense or labor upon it that fact cannot constitute a bar to his reclaiming it, so long as identification is not impracticable. But there must, nevertheless, in reason be some limit to the right to follow and reclaim materials which have undergone a process of manufacture. Mr. Justice Blackstone lays down the rule very broadly, that if a thing is

changed into a different species, as by making wine out of another's grapes, oil from his olives, or bread from his wheat, the product belongs to the new operator, who is only to make satisfaction to the former proprietor for the materials converted. 2 Bl. Com., 404. We do not understand this to be disputed as a general proposition, though there are some authorities which hold that, in the case of a wilful appropriation, no extent of conversion can give to the wilful trespasser a title to the property so long as the original materials can be traced in the improved article. The distinction thus made between the case of an appropriation in good faith and one based on intentional wrong, appears to have come from the civil law, which would not suffer a party to acquire a title by accession, founded on his own act, unless he had taken the materials in ignorance of the true owner, and given them a form which precluded their being restored to their original condition. 2 Kent, 363. While many cases have followed the rule as broadly stated by Blackstone, others have adopted the severe rule of the civil law where the conversion was in wilful disregard of right. The New York cases of *Betts v. Lee*, 5 Johns. 348; *Curtis v. Groat*, 6 Johns. 168; and *Chandler v. Edson*, 9 Johns. 362, were all cases where the wilful trespasser was held to have acquired no property by a very radical conversion, and in *Silisbury v. McCoon*, 3 Comstock, 378, 385, the whole subject is very fully examined, and Ruggles, J., in delivering the opinion of the court, says that the common law and the civil law agree "that if the chattel wrongfully taken come into the hands of an *innocent holder* who, believing himself to be the owner, converts the chattel into a thing of different species, so that its identity is destroyed, the original owner cannot reclaim it. Such a change is said to be wrought when wheat is made into bread, olives into oil, or grapes into wine. In a case of this kind, the change in the species of the chattel is not an intentional wrong to the original owner. It is, therefore, regarded as a destruction or consumption of the original materials, and the true owner is not permitted to trace the identity into the manufactured article, for the purpose of appropriating to his own use the labor and skill of the innocent occupant who wrought the change; but he is put to his action for damages as for a thing consumed, and may recover its value as it was when the conversion or consumption took place," and further on he says of the civil law, with which the common law is supposed by him to harmonize: "The acknowledged principle of the civil law is that a wilful wrong-doer acquires no property in the goods of another either by the wrongful taking, or by any change wrought in them by his labor or skill, however great that change may be. The new product in its improved state belongs to the owner of the original materials, provided it be proved to be made from them; the trespasser loses his labor, and that change which is regarded as a destruction of the goods, or an alteration of their identity in favor of an honest possessor, is not so regarded as between the original owner and a wilful violator of his right of property." In further illustration of the same views we refer to *Hyde v. Cookson*, 21 Barb. 104; *Mar-*

tin v. Porter, 5 M. & W. 351; *Wild v. Holt*, 9 M. & W. 672; *Baker v. Wheeler*, 8 Wend. 508; *Snyder v. Vaux*, 2 Rawle, 427; *Riddle v. Driver*, 12 Ala. 590.

It does not become necessary for us to consider whether the case of *Silsbury v. McCoon*, 3 Comstock, 378, which overruled the prior decisions of the supreme court (reported in 4 Denio, 425, and 6 Hill, 332), has not recognized a right in the owner of the original materials to follow them under circumstances when it would not be permitted by the rule as recognized by the authorities generally. That was the case where a wilful trespasser had converted corn into whisky, and the owner of the corn was held entitled to the manufactured article. The rule as given by Blackstone would confine the owner, in such case, to his remedy to recover damages for the original taking. But we are not called upon in this case to express any opinion regarding the rule applicable in the case of a wilful trespasser, since the authorities agree in holding, that when the wrong had been involuntary, the owner of the original materials is precluded, by the civil law and common law alike, from following and reclaiming the property after it has undergone a transformation which converts it into an article substantially different.

The cases of confusion of goods are closely analogous. It has always been held that he who, without fraud, intentional wrong, or reckless disregard of the rights of others, mingled his goods with those of another person, in such manner that they could not be distinguished, should, nevertheless, be protected in his ownership so far as the circumstances would permit. The question of motive here becomes of the highest importance; for, as Chancellor Kent says, if the commingling of property "was wilfully made without mutual consent, . . . the common law gave the entire property, without any account, to him whose property was originally invaded, and its distinct character destroyed. Popham's Rep. 38, pl. 2. If A will wilfully intermix his corn or hay with that of B, or casts his gold into another's crucible, so that it becomes impossible to distinguish what belonged to A from what belonged to B, the whole belongs to B. Popham's Rep. *ub. supra*; *Warde v. Ayre*, 2 Bulst. 323, 2 Kent, 364, 365; and see 2 Bl. Com. 404; *Hart v. Ten Eyck*, 2 Johns. Ch. 62; *Gordon v. Jenney*, 16 Mass. 465; *Treat v. Barber*, 7 Conn. 280; *Barron v. Cobleigh*, 11 N. H. 561; *Roth v. Wells*, 29 N. Y. 486; *Willard v. Rice*, 11 Met. 493; *Jenkins v. Steanka*, 19 Wis. 128; *Hesseltine v. Stockwell*, 30 Me. 237. But this rule only applies to wrongful or fraudulent intermixtures. There may be an intentional intermingling and yet no wrong intended; as where a man mixes two parcels together, supposing both to be his own; or, that he was about to mingle his with his neighbor's, by agreement, and mistakes the parcel. In such cases, which may be deemed accidental intermixtures, it would be unreasonable and unjust that he should lose his own or be obliged to take and pay for his neighbor's, as he would have been under the civil law. Morton, J., in *Ryder*

v. *Hathaway*, 21 Pick. 305. In many cases there will be difficulty in determining precisely how he can be protected with due regard to the rights of the other party; but it is clear that the law will not forfeit his property in consequence of the accident or inadvertence, unless a just measure of redress to the other party renders it inevitable. Story on Bailm. § 40; Sedg. on Dams. 483.

The important question on this branch of the case appears to us to be, whether standing trees, when cut and manufactured into hoops, are to be regarded as so far changed in character that their identity can be said to be destroyed within the meaning of the authorities. And as we enter upon a discussion of this question, it is evident at once that it is difficult, if not impossible, to discover any invariable and satisfactory test which can be applied to all the cases which arise in such infinite variety. "If grain be taken and made into malt, or money taken and made into a cup, or timber taken and made into a house, it is held in the old English law that the property is so altered as to change the title. Bro. tit. Property, pl. 23;" 2 Kent, 363. But cloth made into garments, leather into shoes, trees hewn or sawed into timber, and iron made into bars, it is said may be reclaimed by the owner in their new and original shape. Sedg. on Dams. 484; *Snyder v. Vaux*, 2 Rawle, 427; *Betts v. Lee*, 5 Johns. 348; *Curtis v. Groat*, 6 Johns. 168; *Brown v. Sax*, 7 Cow. 95; *Silisbury v. McCoon*, 4 Denio, 333, per Bronson, J.; *Ibid.*, 6 Hill, 426, per Nelson, Ch. J.; *Ibid.*, 3 Comstock, 386, per Ruggles, J. Some of the cases place the right of the former owner to take the thing in its altered condition upon the question whether its identity could be made out by the senses. Year Book 5, H. 7, fo. 15, pl. 6; 4 Denio, 335 note. But this is obviously a very unsatisfactory test, and in many cases would wholly defeat the purpose which the law has in view in recognizing a change of title in any of these cases. That purpose is not to establish any arbitrary distinctions, based upon mere physical reasons, but to adjust the redress afforded to the one party and the penalty inflicted upon the other, as near as circumstances will permit, to the rules of substantial justice.

It may often happen that no difficulty will be experienced in determining the identity of a piece of timber which has been taken and built into a house; but no one disputes that the right of the original owner is gone in such a case. A particular piece of wood might perhaps be traced without trouble into a church organ, or other equally valuable article; but no one would defend a rule of law which, because the identity could be determined by the senses, would permit the owner of the wood to appropriate a musical instrument, a hundred or a thousand times the value of his original materials, when the party who, under like circumstances, has doubled the value of another man's corn by converting it into malt, is permitted to retain it, and held liable for the original value only. Such distinctions in the law would be without reason, and could not be tolerated. When the right to the improved article is the point in issue, the

question, how much the property or labor of each has contributed to make it what it is, must always be one of first importance. The owner of a beam built into the house of another loses his property in it, because the beam is insignificant in value or importance as compared to that to which it has become attached, and the musical instrument belongs to the maker rather than to the man whose timber was used in making it, — not because the timber cannot be identified, but because in bringing it to its present condition the value of the labor has swallowed up and rendered insignificant the value of the original materials. The labor, in the case of the musical instrument, is just as much the principal thing as the house is in the other case instanced; the timber appropriated is in each case comparatively unimportant.

No test which satisfies the reason of the law can be applied in the adjustment of questions of title to chattels by accession, unless it keeps in view the circumstance of relative values. When we bear in mind the fact that what the law aims at is the accomplishment of substantial equity, we shall readily perceive that the fact of the value of the materials having been increased a hundred fold, is of more importance in the adjustment than any chemical change or mechanical transformation, which, however radical, neither is expensive to the party making it, nor adds materially to the value. There may be complete changes with so little improvement in value, that there could be no hardship in giving the owner of the original materials the improved article; but in the present case, where the defendant's labor — if he shall succeed in sustaining his offer of testimony — will appear to have given the timber in its present condition nearly all its value, all the grounds of equity exist which influence the courts in recognizing a change of title under any circumstances.

We are of opinion that the court erred in rejecting the testimony offered. The defendant, we think, had a right to show that he had manufactured the hoops in good faith, and in the belief that he had the proper authority to do so; and if he should succeed in making that showing, he was entitled to have the jury instructed that the title to the timber was changed by a substantial change of identity, and that the remedy of the plaintiff was an action to recover damages for the unintentional trespass.

This view will dispose of the case upon the present record. Upon the other points we are not prepared to assent entirely to the views of the plaintiff in error. It does not appear to us important that the deed from Sumner to Camp and Brooks was intended as a mere security. Under such a deed Sumner would have had a right of redemption, but it does not follow that he would have been entitled to possession, and to all the other rights of mortgagor in the courts of law. When a deed absolute in form is given to secure a debt, the purpose generally is to vest in the grantee a larger power of control and disposition than he would have by statute under an ordinary mortgage; and we are not prepared to say that the statute — Comp. L. § 4614 — which forbids eject-

ment by mortgagees before foreclosure was intended to reach a case of that description. We think, however, that the mere circumstance of the sale of Sumner's interest did not operate in law as a revocation of the authority previously given to Sumner to sell the timber. It is quite possible that Green would not have given his authority had Sumner not been tenant in common of the land with him; but there is no absolute presumption of the law to that effect; and we cannot say that Green would have revoked the authority had he been aware of Sumner's conveyance. Nor was it necessary that the license given by Sumner to Wetherbee should have been in any particular form. A mere license to enter upon land and cut timber does not confer a legal right to do so; but it nevertheless protects the licensee so far as he has acted under it before revocation, and the protection does not depend upon its form, but upon what has been done having proceeded by consent. However informal the consent may have been, the land owner cannot be allowed, by afterwards recalling it, to make the licensee a trespasser for what he has done in reliance upon it.

For the reasons given, the judgment must be reversed, with costs, and a new trial ordered.

The other justices concurred.¹

¹ "The value of the cross-ties in controversy was twelve and a half cents a tie. The value of each in the tree was two cents. The value of the labor expended upon them is not shown, but assuming it to be the increased value of ten and a half cents a tie, the difference between it and the value of the original material is not so great as to make the value of the latter, as compared with that of the former, insignificant, and to make the appropriation of the cross-ties by the original owner to his own use, without compensation, appear, under the circumstances, gross injustice at the first blush. The disparity is not so great as it was in *Wetherbee v. Green*, *supra*, in which trees of the value of \$25 were cut and taken by one from the land of another and converted into hoops of the value of \$700, which was twenty-eight times the value of the trees, while the cross-ties in this case were about six times; and yet the Supreme Court of Michigan, in *Isle Royale Mining Co. v. Hertin*, *supra*, said that 'perhaps no case has gone further than *Wetherbee v. Green*.'

"In considering the justice of permitting the appellant to appropriate the cross-ties to his own use, the invasion of his rights and the injury done to him by appellee should not be overlooked. The trees belonged to him. They were standing upon his land, and he had the right to hold them as they were. No one had the right to take them from him, convert them into ties, and force him to accept their value at the time of the conversion. He may have preferred to have them to stand; and, if left standing for a few years, they might yield him great profit, and the enhancement of their value by the labor of appellee might be a poor compensation for the wrong done. But whether he wished to sell or not, it would be gross injustice to permit appellee to force him to sell. He is entitled to the protection of the laws. Deny to him the right to the cross-ties, and force him to accept the value of his timber when appropriated by a trespasser, as it was at the time of the conversion, and he has no adequate protection. The injury inflicted by the trespasser would be borne in part by the innocent owner, and the guilty would escape. 'Such a doctrine,' as said by Chief Justice Cooley, 'offers a premium to heedlessness and blunders, and a temptation by false evidence to give an intentional trespass the appearance of an innocent mistake.'

"Assuming the trees to be the property of appellant, and taking into consideration the great wrong committed by appellee in cutting them, the deprivation to the appellant of the right to use the same as it might please him, the probable loss occasioned

ILLINOIS AND ST. LOUIS RAILROAD AND COAL
CO. v. OGLE.

SUPREME COURT OF ILLINOIS. 1876.

[Reported 82 Ill. 627.]

APPEAL from the Circuit Court of St. Clair county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Messrs. G. & G. A. Koerner, for the appellant.

Messrs. C. W. & E. L. Thomas, for the appellee.

thereby, the fact that the identification of the original material was unaffected by the labor expended, the encouragement that would be afforded to trespassers by allowing them to enjoy the fruits of their labor upon a mere showing of mistake, the protection a contrary policy would afford to the owner of standing trees against heedlessness, carelessness, pretended mistakes, and trespasses, and the importance of pursuing such course to secure such protection, — and comparing the injury inflicted upon the appellant by the appellee, and the injustice of taking from the former his property against his will, with the hardship the latter may suffer by the loss of his labor, we think it would be lawful and right to allow appellant to recover the cross-ties, and to impose upon the appellee the consequences of his own carelessness.

“But appellant has not obtained possession of the cross-ties. In the event he cannot do so, he is entitled to the value of the property he has lost. How is this value to be estimated? This question is not beset with the difficulties which attend the right of recaption. When the appellant sued for the possession of the cross-ties, he was entitled to their possession, unless he had lost his property by the wrongful act of another. If entitled to retake it in its new form, it must be taken as he found it, though enhanced in value by the labor of appellee. The ties cannot be restored to their original form. The appellee cannot force the appellant to become a debtor to him for the value of his labor, nor demand compensation for his voluntary additions to the value of the trees converted into ties, without the assent of the appellant. He cannot impose any conditions upon the right to retake them. The question, therefore, being whether the appellee shall lose his labor, or the appellant lose the right to take his property, the law decides in favor of the latter. But, in determining the compensation the appellant shall receive as the value of his property which has been wrongfully converted, the difficulty does not arise. The value of the property of the owner, which has been converted, can be ascertained and fixed without including therein the labor expended upon it. Hence the law protects the unintentional trespasser in such cases by limiting the right of the owner to recover. *Peters B. & L. Co. v. Lesh*, 119 Ind. 98; *Heard v. James*, 49 Miss. 236; *Herdie v. Young*, 55 Pa. St. 176; *Single v. Schneider*, 30 Wis. 570; 2 Sedgwick, Damages (8th ed.), § 534; *Isle Royale Mining Company v. Hertin*, 26 Am. Rep. pp. 525, 530. As to the extent of this limitation, the authorities are not agreed. But we think that, inasmuch as this is an exception to the general rule, made for the purpose of protecting the unintentional trespasser, it should be allowed to prevail only to the extent it is necessary to give protection, and that the owner, in actions for the possession of personal property in the new form into which it has been converted inadvertently, under a *bona fide* but mistaken belief of right, ‘in case a delivery cannot be had,’ is entitled to recover the value of the property in its new form, less the labor and material expended in transforming it, provided the expenditures do not exceed the increase in value which was added to the transformation, in which event he should recover the value of the property in its new form, less the in-

Mr. JUSTICE CRAIG delivered the opinion of the Court :

This was an action of trespass, brought by David Ogle in the circuit court of St. Clair county, against The Illinois and St. Louis Railroad and Coal Company, to recover damages for an unlawful entry upon the plaintiff's close, and digging out a certain vein of coal. A trial of the cause before a jury resulted in a verdict and judgment in favor of the plaintiff, to reverse which this appeal was taken by the defendant.

The only error assigned is, that the court erred in instructing the jury in regard to the measure of damages, as follows :

"If the jury believe, from the evidence, that the defendant trespassed upon plaintiff's land, and mined coal therefrom, and converted it to its own use, the jury are to be in nowise limited by the value of the land itself, but must regard the instructions of the court upon the question of what is the proper measure of damages.

"If the jury believe, from the evidence, that the defendant, by its servants and employees, mined coal from plaintiff's land without his consent, as alleged in the declaration, and did so by mistake or inadvertence, and without knowledge that the coal was being mined from plaintiff's land, then the jury are bound to allow plaintiff the value of the coal taken from his land within five years before this suit was commenced, estimated at the pit mouth, less the cost of carrying it where it was dug to the pit mouth, or, in other words, the plaintiff, under the above circumstances, is to be allowed the value of the coal at the pit mouth, less the cost of carrying it there from the place where it was dug, allowing defendant nothing for the digging, the verdict, however, not to exceed \$65,000."

In *Robertson v. Jones*, 71 Ill. 405, the same question presented by the instructions of the court in this case arose, and we there held, in an action of trespass, the owner of the mine could recover the value of the coal as soon as it was severed and became a chattel, or he might

crease. *Weymouth v. Chicago & Western Railway Co.*, 17 Wis. 550. Some courts hold that the owner, in such cases, should recover the value of his property in its new form, less the expense incurred in converting it into such form and increasing its value. *Goller v. Fett*, 30 Cal. 482; *Naye v. Yappen*, 23 Cal. 306; *Herdic v. Young*, 55 Pa. St. 176. But we do not think this is a correct rule in all cases, for the expense may in some cases exceed the increase in value, and in that event the rule would require the owner to pay for something that he never received.

"According to this opinion, two errors appear in the record in this action. One is in the form of the judgment. If the appellant was the owner of the property in controversy, he was entitled to a judgment for its possession, and for its value, according to the rule before stated, 'in case a delivery cannot be had.' Sand. & H. Dig. § 6398. On the contrary, the judgment rendered is for the value of the property determined by the court, and then for its possession in the event the value is not paid. The other error is the failure to fix the value according to the rule we have stated.

"For these errors the judgment of the circuit court is reversed, and the cause is remanded for a new trial." — *BATTLE, J.*, in *Eaton v. Langley*, 65 Ark. 448, 457 (1898).

See *Murphy v. The S. C. & P. R. Co.*, 55 Iowa, 473; *Lewis v. Courtright*, 77 Iowa, 190; *Strubbee v. The Trustees*, 78 Ky. 481; *Wing v. Milliken*, 91 Me. 387; *Isle Royale Mining Co. v. Hertin*, 37 Mich. 332; *Gates v. Rifle Boom Co.*, 70 Mich. 309; *Carpenter v. Lingenfelter*, 42 Neb. 728.

recover the value of the coal at the mouth of the pit, less the cost of removing it from the mine, after it was dug, to the pit's mouth.

The instructions given are in harmony with the views expressed in *Robertson v. Jones*, but it is urged by appellant that a different rule has been established in other courts, and our attention is called particularly to *Wood v. Morewood*, 43 E. C. L. 810; *Forsythe v. Wells*, 41 Pa. St. 291; and the late case, in Michigan, of *Winchester v. Craig*, decided at the January term, 1876.

The decision in *Robertson v. Jones*, *supra*, although in harmony with other authorities, is predicated mainly on the decision of *Martin v. Porter*, 5 M. & W. 353, which, like the case before us, was an action of trespass for breaking and entering the plaintiff's close and carrying away coal, by an owner of an adjoining estate. On motion to reduce the damages, before a full bench, it was held that the plaintiff was entitled to recover the value of the coal as soon as it existed as a chattel, which would be its value at the mouth of the pit, after deducting the expense of carrying the coals from the place in the mine where dug, to the pit's mouth.

This decision was rendered in 1839. In 1841, *Wood v. Morewood*, *supra*, was tried at Derby Summer Assizes, before Baron Parke, and on the trial the Baron directed the jury: "That if there was fraud or negligence in the defendant, they might give as damages, under the count in trover, the value of the coals at the time they first became chattels, on the principle laid down in *Martin v. Porter*; but if they thought that the defendant was not guilty of fraud or negligence, but acted honestly and fairly, in the full belief he had a right to do what he did, they might give the fair value of the coals, as if the coal fields had been purchased from the plaintiff."

This decision is cited by appellant as authority that the rule announced in *Martin v. Porter*, was not adhered to in the courts in England; but the fallacy of the position is fully established by the decision of *Morgan v. Powell*, 43 Eng. Com. L. 734, which was an action of trespass for entering the plaintiff's close, and mining and carrying away coal. On a rule before Lord Denman, Patterson, Williams, and Coleridge, JJ., to show cause why the expense of mining and carrying the coals from the mine to the mouth of the pit should not be deducted from the verdict, Lord Denman said: "We are of opinion that the rule in *Martin v. Porter* is correct, and properly applicable to the present case. The jury must give compensation for the pecuniary loss sustained by the plaintiff from the trespass committed in taking his coal, compensation having been separately given for all the injury done to the soil by digging, and for the trespass committed in digging the coal along the plaintiff's adit; and the estimate of that loss depends on the value of the coal when severed — that is, the price at which the plaintiff could have sold it. This, plainly, was the value of the coal at that moment. The defendant had no right to be reimbursed for his own unlawful act in procuring the coal, nor can he, prop-

erly speaking, bring any charge against the plaintiff for labor expended upon it. But it could have no value as a salable article without being taken from the pit. Any one purchasing it there, would, as of course, have deducted from the price the cost of bringing it to the pit's mouth. Instances may easily be supposed where particular circumstances would vary this mode of calculating the damage, but none such appear."

In the argument, the case of *Wood v. Morewood*, decided at *Nisi Prius* by Parke, B., was cited, and relied upon as establishing the correct rule of damages. Yet the court in no manner alluded to that decision, but, on the other hand, followed and affirmed *Martin v. Porter*.

The doctrine announced in *Martin v. Porter* was again followed and adhered to in the case of *Wild et al. v. Holt*, 9 Mees. & Wels. 672.

So far, therefore, as we understand the English authorities, in an action of trespass, like the case under consideration, the rule of damages is well settled that the plaintiff is entitled to recover the value of the coal at the mouth of the pit, after deducting the cost of removing it from the place where mined to the pit's mouth.

No necessity exists for one miner to trespass upon an adjoining owner. If proper maps and plans of the mine are kept, and measurements and surveys of the work made, as required by common prudence and the statute, each miner will have no difficulty in confining his operations to his own estate. When, therefore, one miner, in disregard of his duty, invades the property of another, he should not be permitted to profit by his unlawful act, which would be the case if the trespasser was only required to pay the value of the coal as it existed in the mine before it was taken.

It is true, a different rule was established in *Forsythe v. Wells*, *supra*, cited by appellant; but that case seems to be predicated upon what was said in *Wood v. Morewood*, *supra*, which, as we have attempted to show, cannot be regarded as the doctrine of the English courts. The doctrine announced in the Michigan case, cited by appellant, in so far as the question here involved is discussed, seems to follow the rule announced in the case cited from Pennsylvania, which we are not inclined to adopt.

The same question involved in this case, in 1873, came before the Supreme Court of Maryland, in *Berlin Coal Co. v. Cox*, 39 Md. 1. The action was trespass, to recover damages for mining and carrying away coal. The court, after a thorough and able review of the authorities bearing upon the question of the correct rule of damages, approved and followed the rule announced in *Martin v. Porter*, *supra*. In the concluding part of the opinion bearing upon the question, it is said: "The necessity and importance of this rule can scarcely be magnified in a community where the wealth of the country consists in its mineral deposits."

It is true the authorities in the States are not entirely harmonious, but we are satisfied the rule announced in *Robertson v. Jones* is correct

in principle, that it is in harmony with the rule adopted in England and in most of the States, and we perceive no reason for departing from the doctrine announced.

Believing that the instructions of the circuit court are correct, the judgment will be affirmed. *Judgment affirmed.*¹

WOODEN-WARE COMPANY v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1882.

[Reported 106 U. S. 432.]

ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

The facts are stated in the opinion of the court.

Mr. Samuel D. Hastings, Jr., for the plaintiff in error.

Mr. Assistant Attorney-General Maury, for the United States.

¹ "Now, my Lords, there was a technical rule in the English courts in these matters. When something that was part of the realty (we are talking of coal in this particular case) is severed from the realty and converted into a chattel, then instantly on its becoming a chattel, it becomes the property of the person who had been the owner of the fee in the land whilst it remained a portion of the land; and then in estimating the damages against a person who had carried away that chattel, it was considered and decided that the owner of the fee was to be paid the value of the chattel at the time when it was converted, and it would in fact have been improper, as qualifying his own wrong, to allow the wrongdoer anything for that mischief which he had done, or for that expense which he had incurred in converting the piece of rock into a chattel, which he had no business to do.

"Such was the rule of the common law. Whether or not that was a judicious rule at any time I do not take upon myself to say; but a long while ago (and when I say a long while I mean twenty-five years ago) Mr. Baron Parke put this qualification on it, as far as I am aware for the first time. He said, If however the wrongdoer has taken it perfectly innocently and ignorantly, without any negligence and so forth, and if the jury, in estimating the damages, are convinced of that, then you should consider the mischief that has been really done to the plaintiff who lost it whilst it was part of the rock, and therefore you should not consider its value when it had been turned into a piece of coal after it had been severed from the rock, but you should treat it at what would have been a fair price if the wrongdoer had bought it whilst it was yet a portion of the land as you would buy a coal-field. *Wood v. Morewood*, 4 Q. B. n. 440. That was the rule to be applied where it was an innocent person that did the wrong; that rule was followed in the case of *Jegon v. Vivian*, Law Rep. 6 Ch. 742, which has been so much mentioned; it was followed in the Court of Chancery, and, so far as I know, it has never been questioned since, that where there is an innocent wrongdoing the point that is to be made out for the damages is, as was expressed in the minutes of the decree: 'The defendants to be charged with the fair value of such coal and other minerals at the same rate as if the mines had been purchased by the defendants at the fair market value of the district;' that I understand to mean as if the mines had been purchased while the minerals were yet part of the soil."—Per LORD BLACKBURN, in *Livingstone v. Rawyard Coal Co.*, 5 App. Cas. 25, 39. See *Beede v. Lamprey*, 64 N. H. 510.

MR. JUSTICE MILLER delivered the opinion of the court.

This is a writ of error, founded on a certificate of division of opinion between the judges of the Circuit Court.

The facts, as certified, out of which this difference of opinion arose appear in an action in the nature of trover, brought by the United States for the value of two hundred and forty-two cords of ash timber, or wood suitable for manufacturing purposes, cut and removed from that part of the public lands known as the reservation of the Oneida tribe of Indians, in the State of Wisconsin. This timber was knowingly and wrongfully taken from the land by Indians, and carried by them some distance to the town of Depere, and there sold to the E. E. Bolles Wooden-ware Company, the defendant, which was not chargeable with any intentional wrong or misconduct or bad faith in the purchase.

The timber on the ground, after it was felled, was worth twenty-five cents per cord, or \$60.71 for the whole, and at the town of Depere, where defendant bought and received it, three dollars and fifty cents per cord, or \$850 for the whole quantity. The question on which the judges divided was whether the liability of the defendant should be measured by the first or the last of these valuations.

It was the opinion of the circuit judge that the latter was the proper rule of damages, and judgment was rendered against the defendant for that sum.

We cannot follow counsel for the plaintiff in error through the examination of all the cases, both in England and this country, which his commendable research has enabled him to place upon the brief. In the English courts the decisions have in the main grown out of coal taken from the mine, and in such cases the principle seems to be established in those courts, that when suit is brought for the value of the coal so taken, and it has been the result of an honest mistake as to the true ownership of the mine, and the taking was not a wilful trespass, the rule of damages is the value of the coal as it was in the mine before it was disturbed, and not its value when dug out and delivered at the mouth of the mine. *Martin v. Porter*, 5 Mee. & W. 351; *Morgan v. Powell*, 3 Ad. & E. n. s. 278; *Wood v. Morewood*, 3 id. 440; *Hilton v. Woods*, Law Rep. 4 Eq. 432; *Jegon v. Vivian*, Law Rep. 6 Ch. App. 742.

The doctrine of the English courts on this subject is probably as well stated by Lord Hatherley in the House of Lords, in the case of *Livingstone v. Rawyards Coal Co.*, 5 App. Cas. 25, as anywhere else. He said: "There is no doubt that if a man furtively, and in bad faith, robs his neighbor of his property, and because it is underground is probably for some little time not detected, the court of equity in this country will struggle, or, I would rather say, will assert its authority to punish the fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allow-

ance in respect of what he has so done, as would have been justly made to him if the parties had been working by agreement." But "when once we arrive at the fact that an inadvertence has been the cause of the misfortune, then the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him *in specie*."

There seems to us to be no doubt that in the case of a wilful trespass the rule as stated above is the law of damages both in England and in this country, though in some of the State courts the milder rule has been applied even in this class of cases. Such are some that are cited from Wisconsin. *Weymouth v. Chicago & Northwestern Railway Co.*, 17 Wis. 550; *Single v. Schneider*, 24 id. 299.

On the other hand, the weight of authority in this country as well as in England favors the doctrine that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern; or if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition.

Winchester v. Craig, 33 Mich. 205, contains a full examination of the authorities on the point. *Heard v. James*, 49 Miss. 236; *Baker v. Wheeler*, 8 Wend. (N. Y.) 505; *Baldwin v. Porter*, 12 Conn. 484.

While these principles are sufficient to enable us to fix a measure of damages in both classes of torts where the original trespasser is defendant, there remains a third class, where a purchaser from him is sued, as in this case, for the conversion of the property to his own use. In such case, if the first taker of the property were guilty of no wilful wrong, the rule can in no case be more stringent against the defendant who purchased of him than against his vendor.

But the case before us is one where, by reason of the wilful wrong of the party who committed the trespass, he was liable, under the rule we have supposed to be established, for the value of the timber at Depere the moment before he sold it, and the question to be decided is whether the defendant who purchased it then with no notice that the property belonged to the United States, and with no intention to do wrong, must respond by the same rule of damages as his vendor should if he had been sued.

It seems to us that he must. The timber at all stages of the conversion was the property of plaintiff. Its purchase by defendant did not divest the title nor the right of possession. The recovery of any sum whatever is based upon that proposition. This right, at the moment preceding the purchase by defendant at Depere, was perfect, with no right in any one to set up a claim for work and labor bestowed on it by the wrong-doer. It is also plain that by purchase from the wrong-doer defendant did not acquire any better title to the property than his

vendor had. It is not a case where an innocent purchaser can defend himself under that plea. If it were, he would be liable to no damages at all, and no recovery could be had. On the contrary, it is a case to which the doctrine of *caveat emptor* applies, and hence the right of recovery in plaintiff.

On what ground, then, can it be maintained that the right to recover against him should not be just what it was against his vendor the moment before he interfered and acquired possession? If the case were one which concerned additional value placed upon the property by the work or labor of the defendant after he had purchased, the same rule might be applied as in case of the inadvertent trespasser.

But here he has added nothing to its value. He acquired possession of property of the United States at Depere, which, at that place, and in its then condition, is worth \$850, and he wants to satisfy the claim of the government by the payment of \$60. He founds his right to do this, not on the ground that anything he has added to the property has increased its value by the amount of the difference between these two sums, but on the proposition that in purchasing the property he purchased of the wrong-doer a right to deduct what the labor of the latter had added to its value.

If, as in the case of an unintentional trespasser, such right existed, of course defendant would have bought it and stood in his shoes; but as in the present case, of an intentional trespasser, who had no such right to sell, the defendant could purchase none.

Such is the distinction taken in the Roman law as stated in the Institutes of Justinian, Lib. II. Tit. I. sect. 34.

After speaking of a painting by one man on the tablet of another, and holding it to be absurd that the work of an Apelles or Parrhasius should go without compensation to the owner of a worthless tablet, if the painter had possession fairly, he says, as translated by Dr. Cooper: "But if he, *or any other*, shall have taken away the tablet feloniously, it is evident the owner may prosecute by action of theft."

The case of *Nesbitt v. St. Paul Lumber Co.*, 21 Minn. 491, is directly in point here. The Supreme Court of Minnesota says: "The defendant claims that because they (the logs) were enhanced in value by the labor of the original wrong-doer in cutting them, and the expense of transporting them to Anoka, the plaintiff is not entitled to recover the enhanced value; that is, that he is not entitled to recover the full value at the time and place of conversion." That was a case, like this, where the defendant was the innocent purchaser of the logs from the wilful wrong-doer, and where, as in this case, the transportation of them to a market was the largest item in their value at the time of conversion by defendant; but the court overruled the proposition and affirmed a judgment for the value at Anoka, the place of sale.

To establish any other principle in such a case as this would be very disastrous to the interest of the public in the immense forest lands of

the government. It has long been a matter of complaint that the depredations upon these lands are rapidly destroying the finest forests in the world. Unlike the individual owner, who, by fencing and vigilant attention, can protect his valuable trees, the government has no adequate defence against this great evil. Its liberality in allowing trees to be cut on its land for mining, agricultural, and other specified uses has been used to screen the lawless depredator who destroys and sells for profit.

To hold that when the government finds its own property in hands but one remove from these wilful trespassers, and asserts its right to such property by the slow processes of the law, the holder can set up a claim for the value which has been added to the property by the guilty party in the act of cutting down the trees and removing the timber, is to give encouragement and reward to the wrong-doer, by providing a safe market for what he has stolen and compensation for the labor he has been compelled to do to make his theft effectual and profitable.

We concur with the circuit judge in this case, and the judgment of the Circuit Court is *Affirmed*.¹

SECTION VIII.

CONFUSION.

A. *Lawful or Accidental.*

SMITH v. CLARK.

SUPREME COURT OF NEW YORK. 1839.

[Reported 21 Wend. 83.]

THIS was an action of replevin tried at the Yates circuit in June, 1838, before the Hon. Daniel Moseley, one of the circuit judges.

The plaintiffs declared for the *taking and detaining* of 75 barrels of wheat flour. The defendant pleaded *non cepit* and *property* in himself. On the trial the following facts appeared: Charles Hubbard owned a flouring and custom mill on the outlet of the Crooked Lake. In December, 1834, the plaintiffs made an agreement with him to deliver wheat at his mill, and he agreed that for every 4 bushels and 55 pounds of wheat which should be received, he would deliver the plaintiffs one barrel of superfine flour, warranted to bear inspection in Albany or New York. The plaintiffs purchased from farmers and others nearly 2,000 bushels of wheat, which was from time to time delivered at the mill,

¹ See *United Coal Co. v. Canon City Coal Co.*, 24 Col. 116; *Parker v. Waycross, &c. R. Co.*, 81 Ga. 387; *Hoxsie v. Empire Lumber Co.*, 41 Minn. 548.

and put into a bin with other wheat which Hubbard purchased on his own account, and with the *toll wheat* taken by him from time to time. Hubbard delivered 230 barrels of flour to the plaintiffs, but that was not enough to satisfy his contract. On the 25th March, 1835, he sold 100 barrels of flour to the defendant, and in May following delivered him the 75 barrels of flour in question, in pursuance of the contract of sale. The plaintiffs brought this action and arrested the property on board a canal boat, in which the defendant had caused it to be shipped for market. Hubbard also sold between 30 and 50 barrels of flour at retail, and took 10 or 12 bushels of wheat for his own use. All the wheat manufactured and used by Hubbard was taken from the same bin. The plaintiffs attempted to prove that the 75 barrels of flour in question had been delivered to them by Hubbard.

The defendant moved for a non-suit, which was refused, and raised other questions on the charge of the judge, which are noticed in the opinion of the court. The jury, under the charge of the judge, found a verdict for the plaintiffs, and the defendant now moved for a new trial.

H. Welles and *S. Stevens*, for defendant.

S. Cheever, for plaintiffs.

By the Court, BRONSON, J. The contract between the plaintiffs and Hubbard was, in effect, one of sale, — not of bailment. The property in the wheat passed from the plaintiffs at the time it was delivered at the mill, and Hubbard became a debtor, and was bound to pay for the grain in flour, of the specified description and quantity. There was no agreement or understanding that the wheat delivered by the plaintiffs should be kept separate from other grain, or that this identical wheat should be returned in the form of flour. Hubbard was only to deliver flour of a particular quality, and it was wholly unimportant whether it was manufactured from this or other grain. *Jones on Bail*. 102, 64. A different doctrine was laid down in *Seymour v. Brown*, 19 Johns. R. 44; but the authority of that case has often been questioned. 2 Kent, 589; *Story on Bail*. 193–194, 285; *Buffum v. Merry*, 3 Mason, 478; and the decision was virtually overruled in *Hurd v. West*, 7 Cow. 752, and see p. 756, note. The case of *Slaughter v. Green*, 1 Rand. (Va.) R. 3, is much like *Seymour v. Brown*. They were both hard cases, and have made bad precedents.

There was, I think, no evidence which would authorize the jury to find that the flour in question had been delivered by Hubbard to the plaintiffs. There certainly was no direct evidence of that fact, and Hubbard himself testified expressly that there had been no delivery. The proof given by the plaintiffs of what Hubbard had said to others about the flour in the mill was not necessarily inconsistent with his testimony.

But if there had been a delivery, so that the property in the flour passed to the plaintiffs, they still labor under a difficulty in relation to the form of the remedy. Notwithstanding the transfer, the property

was left in the possession and under the care of Hubbard. He was a bailee of the goods, and as such would have been answerable to the plaintiffs for any loss happening through gross negligence on his part. The defendant took the flour by delivery from the bailee, who had a special property in it. Such a taking is not *tortious*. *Marshall v. Davis*, 1 Wend. 109; *Earll v. Camp*, 16 Wend. 570. The plaintiffs should have counted on the *detention*, not on the *taking* of the goods. *Randall v. Cook*, 17 Wend. 57; 10 Wend. 629. There must be a new trial.
New trial granted.

CHASE v. WASHBURN.

SUPREME COURT OF OHIO. 1853.

[Reported 1 Ohio St. 244.]

ERROR to the Common Pleas, reserved in the District Court of Huron County for decision by the Supreme Court.

The original action was *assumpsit*, in which the plaintiff, Washburn, sought to recover the value of a quantity of wheat, which had been delivered by him to the defendants, Chase & Co., as warehousemen, engaged in the produce business, at the village of Milan, in said county.

It appears from the bill of exceptions taken in the case that on the trial of the cause in the Common Pleas, Washburn offered in evidence sundry warehouse receipts, given him by Chase & Co. for wheat delivered at various times, between the month of October, 1847, and the month of August, 1849, amounting in the aggregate to six hundred bushels and more. The receipts are similar in form and effect, and the first in date, which may be taken as a sample of the others, is as follows:—

“MILAN, O., Nov. 5, 1847.

Received in store from J. C. Washburn (by son), the following articles to wit: Thirty bushels of wheat.
H. CHASE & Co.”

It further appears that the agent of Washburn was introduced as a witness, who testified that he had been instructed by Washburn, the defendant in error, when he delivered the first load of the wheat, not to sell the wheat for less than one dollar per bushel, and if he could not get that, to leave it in store with Chase & Co., the plaintiffs in error, and that he told Chase that Washburn had five or six hundred bushels to draw, and that Chase at the time told the agent, when he left the first load, that they (Chase & Co.) would pay the highest price when Washburn should call for it. The wheat was accordingly from time to time delivered, and in May, 1850, a demand was made for either the wheat or the money, and both refused.

Chase then offered evidence tending to prove that his warehouse was burnt on the night of the 26th of October, 1849, and that there was then consumed in it sufficient wheat to answer all his outstanding receipts. He also offered evidence tending to prove that the custom at Milan was to store all wheat received in a common mass and to ship from the same as occasion required, and that this custom was understood by Washburn; also that the custom was, when parties called for their pay, either to pay the highest market price, or deliver wheat to the holder of the receipts.

Washburn then offered rebutting evidence, tending to prove that Chase had not sufficient wheat in his warehouse, at the time of the fire, to answer all his outstanding receipts, and also that the warehouse was emptied of all wheat between the date of the last receipt given Washburn and the time of the fire.

Upon this state of facts the counsel for Chase asked the court to charge the jury, "that the customs at Milan, if known to Washburn, in the absence of an express contract, became a part of the contract between the parties, and if the jury should find that Chase had sufficient wheat on hand at the time of the fire to answer all his outstanding receipts, that he was not liable in this action, and that neither the mingling of the wheat nor the shipment of it would make Chase liable, if he had a sufficient amount on hand at the time of the fire to answer his outstanding receipts."

The court, however, refused to charge as requested. The bill of exceptions sets out the charge of the court in full, to which the counsel for the defendants below excepted. The verdict and judgment was in favor of the plaintiff below, to reverse which this writ of error is brought.

It is alleged for error that the court of Common Pleas erred in their charge as follows, to wit: —

1st. Because that court charged the jury, "that if they should find that the wheat was received and put in mass, with other wheat of defendant, and that received of other persons, with the understanding that the wheat was to be at the disposal of the defendant, either to retain or to ship it, and with the agreement that when the receipts were presented the defendant would either pay the market price therefor or re-deliver the wheat or other wheat equal in amount and quality; then, if the jury should further find that the wheat thus left prior to the fire had all been shipped and disposed of, the defendant cannot be excused unless there was an agreement between the parties that the wheat subsequently purchased by defendant was to be substituted in place of that left by plaintiff, and to be his property."

2nd. Because the court charged the jury "that where a warehouseman receives grain on deposit with an understanding that he may if he choose dispose of it, and that he will, when demanded, return other grain or pay for it, in case of such a disposition he is bound to do the one or the other. A subsequent purchase of grain by the warehouse-

man, for the purpose of meeting the demand for grain thus received, would not be sufficient to vest the property in the plaintiff."

3rd. Because that court refused to charge the jury that the custom at Milan, as proved by defendants if known to plaintiff, was a part of the contract between the parties.

Osborne and Taylor, for plaintiff.

Worcester and Pennewell, for defendant.

BARTLEY, J. To determine which of the parties in this case shall sustain the loss of the property in question occasioned by the accident, it becomes necessary to ascertain the true nature and character of the transaction between them, and the rights created and duties imposed thereby. It was either a contract of sale, a *mutuum*, or a deposit. If a contract of sale, the right of property passed to the purchaser on delivery, and the article was thereafter held by him at his own risk. If a *mutuum*, the absolute property passed to the mutuary, it being a delivery to him for consumption or appropriation to his own use; he being bound to restore not the same thing, but other things of the same kind. Thus, it is held, that if corn, wine, money, or any other thing which is not intended to be delivered back, but only an equivalent in kind, be lost or destroyed by accident, it is the loss of the borrower or mutuary; for it is his property, inasmuch as he received it for his own consumption or use, on condition that he restore the equivalent in kind. And in this class of cases, the general rule is *ejus est periculum, cujus est dominium*. Story on Bailments, § 283; Jones on Bailments, 64; 2 Ld. Raym. 916. But if the transaction here was a deposit, the property remained in the bailor, and was held by the bailee at the risk of the bailor, so long as he observed the terms of the contract, in so doing. But if the bailee shipped the wheat and appropriated the same to his own use, in violation of the terms of the bailment, before the burning of his warehouse, he became liable to the bailor for the value of the property.

What then was the real character of the transaction between the parties? The receipt I suppose to be in the ordinary form of warehouse receipts, and such as would be proper to be delivered by a warehouse depositary of wheat, to the owner, upon its being received into a warehouse, for temporary safe-keeping, and to be re-delivered to the owner on demand. The obligation or contract which the law would imply as against the warehouseman, on the face of such a receipt, would be, that he should use due diligence, in the care of the property, and that he should re-deliver it to the owner, or to his order, on demand, upon being paid a reasonable compensation for his services; and if the warehouseman, under such circumstances, should, without the consent of the owner, mix the wheat with other wheat, belonging to himself or other persons, and ship the same to market, for sale, he would be liable to the owner for the value of the wheat thus deposited with him.

The receipts themselves are silent as to the *time* the wheat was to be kept, the *price* to be paid for its custody, *when* or *how* to be paid, *whose* property it was to be after delivery into the warehouse, and what dis-

position was to be made of it. But it is claimed that, inasmuch as written receipts, whether for money or other property, are always subject to explanation by parol, that the terms on which this wheat was delivered can be explained by the declarations of the parties at the time of the delivery of the first load of wheat, and also by the custom of trade which prevailed among warehousemen at Milan; and that, by such explanation it is shown that the real transaction was that the wheat was received, and, with the consent of the depositor, put in mass with other wheat of the warehouseman, and that received of other persons, with the understanding that the wheat was to be at the disposal of the warehouseman, either to retain or ship it, and that when the receipts should be presented by the depositor the warehouseman should either pay the market price therefor or re-deliver the wheat, or deliver other wheat equal in amount and quality.

If these terms were incorporated into the contract, they could not have excused the liability of the warehouseman in this case. The distinction between an irregular deposit, or a *mutuum*, and a sale, is sometimes drawn with great nicety, but it is clearly marked, and has been settled by high authority. In case of a regular deposit, the bailee is bound to return the specific article deposited; but where the depositary is to return another article of the same kind and value, or has an option to return the specific article, or another of the same kind and value, it is an irregular deposit or *mutuum*, and passes the property as fully as a case of ordinary sale or exchange. Sir William Jones says, "It may be proper to mention the distinction between an obligation to restore the *specific things*, and a *power or necessity of returning others of equal value*. In the first case, it is a regular bailment; in the second it becomes a debt." In the latter case, he considers the whole property transferred.

Judge Story, in his commentaries on the law of bailment, says, "The distinction between the obligation to restore the specific things, and the obligation to restore other things of the like kind and equal in value, holds in cases of hiring, as well as in cases of deposits and gratuitous loans. In the former cases, it is a regular bailment; in the latter, it becomes a debt or innominate contract. Thus, according to the famous laws of Alfenus, in the Digest, "if an ingot of silver is delivered to a silversmith to make an urn, the whole property is transferred, and the employee is only a creditor of metal equally valuable, which the workman engages to pay in a certain shape, unless it is agreed that the specific silver and none other shall be wrought up in the urn." Story on Bailments, § 439.

In all this class of cases, the risk of loss by unavoidable accident attaches to the person who takes the control or dominion over the property. When, therefore, Washburn's wheat was delivered to Chase & Co., and became subject to their disposal, either to retain or to ship it on their own account, the property passed, and the risk of loss by accident followed the dominion over it.

The doctrine here adopted was at one time somewhat obscured by the opinion of Chief Justice Spencer, in the case of *Seymours v. Brown*, 19 John. Rep. 44, in which the court decided that where the plaintiff delivered wheat to the defendants, on an agreement that for every five bushels of wheat the plaintiffs should deliver at the defendants' mill, they, the defendants, would deliver in exchange one barrel of flour, was a bailment, *locatio operis faciendi*; and the wheat having been consumed by fire, through accident, the defendants were not liable on their agreement to deliver the flour. This decision, however, was disapproved of by Chancellor Kent, as not being conformable to the true and settled doctrine laid down by Sir William Jones, who has been styled the great oracle of the law of bailment. 2 Kent's Com. 464. And the decision has been distinctly overruled by repeated subsequent adjudications in the State of New York. *Hurd v. West*, 7 Cowen, 752; *Smith v. Clark*, 21 Wend. 83; *Norton v. Woodruff*, 2 Comstock, 153; *Mal-lory v. Willis*, 4 Comstock, 77; and *Pierce v. Skenck*, 3 Hill, 28.

The same doctrine has been affirmed in the case of *Baker v. Roberts*, 8 Greenleaf's R. 101, and also *Ewing v. French*, 1 Blackford, 354. In the latter case, a quantity of wheat having been delivered by the plaintiff to the defendants, at their mill, to be exchanged for flour, and the defendants having put the wheat into their common stock of wheat, the mill, with the wheat, was afterwards casually destroyed by fire. The court held that the defendants were liable for a refusal to deliver the flour. If in that case the agreement of the parties had been that the flour to be furnished should be the flour which should be manufactured from the specific wheat delivered, instead of an exchange of wheat for flour, it would have been a bailment, and the loss would have fallen upon the plaintiff.

In the case of *Buffum v. Merry*, 3 Mason, 478, where the plaintiff had delivered to the defendant cotton yarn on a contract to manufacture the same into cotton plaids, and the defendant was to find filling, and to weave so many yards of plaids, at eighteen cents per yard, as was equal to the value of the yarn at sixty-five cents per pound, it was held to be a sale of the yarn; and that, by the delivery of it to the defendant, it became his property, and he was responsible for the delivery of the plaid, notwithstanding the loss of the yarn by an accidental fire. But had the plaintiff and the defendant agreed to have the particular yarn, with filling to be found by the defendant, made into plaids on joint account, and the plaids, when woven, were to be divided according to their respective interests in the value of the materials; but, before the division, the plaids had been destroyed by accident, the loss, in the opinion of Judge Story, would have been mutual, each losing the materials furnished by himself.

The case of *Slaughter v. Green*, 1 Randolph, 3, and also the case of *Inglebright v. Hammond*, 19 Ohio Rep. 337, are relied upon as sustaining the plaintiffs in error. These two cases, on examination, do not sustain the doctrine of the case of *Seymours v. Brown*, above referred to

in 19 Johns. Rep. On the contrary, instead of an exchange of wheat for flour, in each of the cases, by the express terms of the contract, the flour to be returned was to be manufactured out of the wheat furnished. In the former case, the written receipts given for the wheat expressly provided, "*that it is received to be ground,*" which excludes the idea of passing the ownership to the miller. And in the latter case, it was also expressly provided by the agreement, that the flour in controversy was "*to be made out of the wheat furnished by Hammond,*" and "*the flour made therefrom was to be delivered at Steubenville for said Hammond's use.*" In both these cases, therefore, the limitation in the agreement of the parties imported a bailment, and not an exchange for flour. And this character of the transaction is not lost either because the custom of the country in reference to which the wheat was received, warranted the mixing of it with the wheat of others, received on like terms; or because, by the express consent of the parties, the wheat was mixed with other wheat in the mill, belonging to the miller himself. When the owners of wheat consent to have their wheat, when delivered at a mill or warehouse, mixed with a common mass, each becomes the owner in common with others, of his respective share in the common stock. And this would not give the bailee any control over the property which he would not have, if the wheat of each one was kept separate and apart. If the wheat, thus thrown into a common mass, be delivered for the purpose of being converted into flour, each owner will be entitled to the flour manufactured from his proper quantity or proportion in the common stock. If a part of the wheat held in common belong to the bailee himself, he could not abstract from the common stock any more than his own appropriate share without a violation of the terms of the bailment; and such a breach of his engagement could not be cured by his procuring other wheat, to be delivered to supply the place of that thus wrongfully taken. But if the wheat be thrown into the common heap, with the understanding or agreement, that the person receiving it, may take from it at pleasure and appropriate the same to the use of himself or others, on the condition of his procuring other wheat to supply its place, the dominion over the property passes to the depository, and the transaction is a sale, and not a bailment.

It is claimed that the court of Common Pleas erred in refusing to charge the jury, as requested, that the custom among warehousemen at Milan, in the absence of an express contract, if known to Washburn, became a part of the contract.

A custom, it is true, is not admissible, either to contradict or alter the terms or legal import of a contract, or to change the title to property by varying a general rule of law. But a custom, when fully established, becomes the law of the trade in reference to which it exists; and the presumption is that the parties intended to conform to it, when they have been silent on the subject. Its office is to interpret the otherwise indeterminate intentions of the parties, and to ascertain the nature and extent of their contract, arising not from express stipulations, but

from mere implications and presumptions, and of acts of doubtful and equivocal character. I am not prepared to say that the *customs at Milan*, if fully established, and known to both the parties to a contract, for the delivery of wheat to a warehouseman, may not be regarded as law, as well as the customs of London, or of Kent. But, unfortunately for the plaintiffs in error, the customs of Milan, as the evidence tended to prove, according to the bill of exceptions, very clearly showed the transaction between the parties in this case, to be a contract of sale, and not a bailment. Had the court, therefore, charged as requested upon this point, it could not have aided the defence set up against the action. So that if the court did err in this particular, no injury was therefore done to the plaintiffs in error. *Judgment affirmed.*¹

LEDYARD v. HIBBARD.

SUPREME COURT OF MICHIGAN. 1882.

[Reported 48 Mich. 421.]

REPLEVIN. Defendants bring error. Affirmed.

Blair, Kingsley & Kleinhaus, for appellant.*Norris & Uhl*, for appellee.

COOLEY, J. Replevin for a quantity of wheat. The following facts were developed on the trial:

The firm of Hibbard & Graff, composed of Wellington Hibbard and Peter Graff, Jr., were merchant millers in Grand Rapids, owning and operating two mills, known respectively as the Crescent and the Valley City. With each mill was an elevator in which they stored wheat for their own purposes, and also received and stored for farmers and others. Plaintiff, from time to time, from March, 1878, to March, 1880, delivered to them wheat which they received into their elevators. The manner of doing the business was as follows: The wheat was drawn from the plaintiff's farm in wagons, discharged into the weighing hopper and elevated into the mills, where it was deposited in bins with other wheat of like kind and quality. A slip or ticket specifying the weight of the load was delivered to the driver of the team, and when a sufficient number of these were gotten together the plaintiff surrendered them to the firm, and received in lieu a receipt on a printed blank. The receipts taken were all of the same form, and the following is a copy of one of them:

"No. 96.

820 bus.

Crescent Mills.

"GRAND RAPIDS, MICH., March 26, 1878.

"Received of William B. Ledyard by L. Byrne 820 bushels number One wheat at owner's risk from elements, at 10 cents less Detroit quotations for same grade when sold to us.

"Stored for days.

"HIBBARD & GRAFF."

¹ See *Rahilly v. Wilson*, 3 Dillon, 420.

The wheat was all stored with plaintiff's knowledge in bins, from which the firm drew from day to day for the purposes of their business and manufacture. The quantity in the bins changed from day to day as it was depleted by drafts and replenished by new deposits. No storage was ever charged, and the dealings between the parties remained entirely unsettled and open until the failure of Hibbard & Graff in March, 1880. Plaintiff, according to his evidence, then demanded his wheat, and failing to obtain it brought this suit. The defendants undertook to show that he demanded not the wheat but the price of it; but on this point the verdict of the jury was against them.

Upon the facts the question of law is presented whether the receipts which the plaintiff took from the firm evidenced a sale or a bailment. If the wheat was sold to Hibbard & Graff when it was delivered to them, it was not pretended that this action would lie; but the plaintiff contended that the delivery of the wheat constituted a bailment, and that it was at his option afterwards to take the value at ten cents less than Detroit quotations, or to receive back the wheat or an equal quantity of the same kind and quality. Storage in the elevators with other wheat, it was claimed, only makes the plaintiff owner in common with others, and he had a right to reclaim his own at any time, as long as the requisite quantity remained. The defendants on the other hand contended that the case differed radically from the ordinary case of the storage of grain in elevators. The wheat deposited in this case became part of a common stock with the wheat of the millers themselves, and was in their hands for consumption in their discretion; the millers might use and consume as their own the whole; it was not delivered to them for the primary purpose of storage *simpliciter*, but in addition to the bailment it was with the understanding that it might be and would be put into the current consumable stock. And the general proposition is asserted that where grain is deposited with any person with the understanding that he may use it on his own account, and when the depositor desires to sell, that the other will pay the highest price, or return a like quantity or quality, the transaction, if not an immediate sale, is a sale at the option of the receiver. *Nelson v. Brown*, 44 Iowa, 455; *Sexton v. Graham*, 53 Iowa, 181; *Nelson v. Brown*, 53 Iowa, 555.

It was agreed on both sides that the "owner" mentioned in the receipt must be understood to be the depositor — the plaintiff. As by the receipt the grain was declared to be at his risk, for the time being, it must have continued to be at his risk until some act was afterwards done by one party or the other to convert what at first was manifestly a bailment into a sale. The plaintiff could not be creditor for the purchase price so long as he remained owner, and the receiptors could not be debtors for the purchase price so long as the risks of accidental destruction remained upon the depositor. The depositor would convert the bailment into a sale by notifying the receiptors of his election to receive the price fixed according to the terms of the contract; and the receiptors, it is claimed, would convert it into a sale by consuming the

wheat in the regular course of their business, as the parties must have understood it was likely they would do.

The question now made could not have arisen if the warehousemen had not been millers as well. But unless the local usage, or the course of dealings between the parties referred to further on, shall be found to affect the case, the fact that the receiptors for the wheat transacted business in the two capacities of warehousemen and millers, would not be of importance, and certainly could not affect the construction of their business contracts. If as warehousemen they gave warehouse receipts for grain received in store, the receipts must be construed by their terms and by commercial usage ; in commercial circles they would be understood to represent the title to the quantity of grain specified ; and though the quantity in store might fluctuate from day to day as grain would be received and delivered out, this would not affect the title of the holder of receipts, who would be at liberty to demand and receive his proper quantity at any time, if so much remained in store. But if the quantity in store is reduced by consumption instead of by shipment or sale, it is not apparent that the rights of the holder of the receipts should be any different. It is true if the wheat is all consumed, and the amount in store is not kept good so that a demand for the wheat can be responded to, and if the consumption is by consent of the owner, express or implied, the consumption under such circumstances may be justly regarded as a meeting of the minds of the parties upon a sale ; but so long as grain is kept in store from which the receipts may be met, the fair presumption is that it is intended they shall be so met ; and this presumption would only be overcome by some act unequivocal in its nature.

The circuit judge instructed the jury that in the absence of any election by the plaintiff to take the price, the bailment continued so long as any portion of the wheat deposited by the plaintiff remained in store, and he was entitled to take the quantity specified in his receipts from any that remained in store with which his own wheat had been mingled. The judge may perhaps have erred in attaching importance to the question whether any portion of the identical grain deposited by the plaintiff remained in store, but if so the error favored the defendants and they cannot complain of it.

There are other questions, however, arising upon an offer of defendants to show a local usage, in the light of which they claim the receipts are to be construed ; and also a course of dealing between the parties which it is supposed will bear upon the construction. The evidence upon these subjects was received by the circuit judge provisionally, but afterwards stricken out.

The evidence as to the dealings between the parties was not very conclusive in its tendency. Mr. Hibbard testified that he had received wheat from the plaintiff in the same way ever since 1874, and that always when the plaintiff got ready to sell, he called for his pay and received it. Every bailment thus became a sale. His testimony tended to show, also, that Hibbard & Graff were never storers of grain except

for the purposes of manufacture. The plaintiff himself testified that he never sold to Hibbard & Graff but twice; the last time being in 1877. But if the receipts which are in evidence imply, as we think they do, an option in the holder to name his time and take the price, or instead thereof to demand the wheat, it cannot be important that under two or many similar receipts the plaintiff had on previous occasions elected to sell. If he found millers here with storage facilities, and stored his grain with them under contracts which reserved to him an option, the reservation of the option implied that he might on different occasions exercise it differently. An option is reserved to give that liberty; and however often the choice may be exercised the same way, the liberty will still remain while the same contract remains to be entered into. Choosing alike many times can imply no promise or understanding that the choice shall be made always.

The evidence of local usage was altogether insufficient to establish a custom. It was testified that the millers of Grand Rapids were accustomed to receive wheat in their mills from farmers and others, and that the depositors called when they pleased and took the market price. But there was no evidence of any general usage in Grand Rapids for the millers to receive wheat in store and issue for it receipts like those issued by Hibbard & Graff and which are in question here. The evidence on the other hand rather tended to show that these receipts were in some respects peculiar, and especially in the clause which provided that the wheat should be at the owner's risk. Usage can never change the written stipulations of parties, though it may aid in the explanation of their terms, and perhaps add incidents in respect to which they are silent: *Eager v. Atlas Ins. Co.*, 14 Pick. 141; *Pavey v. Burch*, 3 Mo. 447; *Farrar v. Stackpole*, 6 Me. 154; *Randall v. Smith*, 63 Me. 105; s. c. 18 Am. Rep. 200; *Boorman v. Jenkins*, 12 Wend. 566; *Dawson v. Kittle*, 4 Hill, 107; *Erwin v. Clark*, 13 Mich. 10; *N. Y. Iron Mine v. Citizens' Bank*, 44 Mich. 345; and the requirement that it shall be certain, definite, uniform and notorious is imperative. *Kendall v. Russell*, 5 Dana, 501; *Parrott v. Thacher*, 6 Pick. 426; *Thwing v. Great Western Ins. Co.*, 111 Mass. 109. "Doubt must be wholly eliminated from the evidence adduced or the usage is not well proved." *Adams v. Pittsburg Ins. Co.*, 76 Penn. St. 411, 414. This general principle is illustrated by numerous cases, among which are *Whitney v. Ocean Ins. Co.*, 14 La. 485; s. c. 33 Am. Dec. 598; *Patton v. Magrath*, Dudley, 159; s. c. 31 Am. Dec. 552; *Touro v. Cassin*, 1 Nott & McC. 173; s. c. 9 Am. Dec. 680; *Walls v. Bailey*, 49 N. Y. 464; *Harris v. Tumbridge*, 83 N. Y. 92; *Isham v. Fox*, 7 Ohio St. 321; *Harper v. Pound*, 10 Ind. 32; *Lamb v. Klaus*, 30 Wis. 94; *Hinton v. Coleman*, 45 Wis. 165; *Kilgore v. Bulkley*, 14 Conn. 390; *Bissell v. Ryan*, 23 Ill. 566; *Leggat v. Sands Ale Co.*, 60 Ill. 158; *Walsh v. Mississippi, &c. Co.*, 52 Mo. 434; *Ober v. Carson*, 62 Mo. 209; *Smith v. Gibbs*, 44 N. H. 335; *McMasters v. Railroad Co.*, 69 Penn. St. 374; *Potts v. Aechternmacht*, 93 Penn. St. 138.

The jury gave their verdict for the plaintiff under instructions which were unexceptionable, and the judgment in his favor must be affirmed with costs.

CAMPBELL and MARSTON, JJ., concurred.

JAMES & NEER v. PLANK Ex'r.

SUPREME COURT OF OHIO. 1891.

[Reported 48 Ohio St. 255.]

ERROR to the Circuit Court of Logan county.

The defendant in error brought his action in the Court of Common Pleas of Logan county to recover the value of a quantity of wheat, which, in his petition, he alleged was sold by him as executor, on or about the 18th day of August, 1886, to the plaintiffs in error, who were partners in trade engaged in the business of purchasing, shipping and selling wheat.

Issue was joined by answer and reply. The principal question to be determined was whether the delivery of the wheat by Plank was a sale or a bailment, the claim of the defendant below being that the transaction was a bailment, and that the wheat was, on the 26th day of August following, without fault on their part, burned except a small portion, of the value of \$36.16, which amount had been tendered.

At the conclusion of the evidence the court instructed the jury that under the undisputed facts the plaintiff was entitled to recover the value of the wheat at the time of delivery, with interest, and a verdict for the plaintiff was found accordingly. Judgment was rendered upon the verdict, which was affirmed by the circuit court, and to reverse these judgments this proceeding in error is brought.

Keifer & Keifer, for plaintiffs in error.

I. Assuming that the answer sets up a good defence, and is supported by testimony as to its substantive averments, the common pleas court erred in its direction to the jury. If there was any evidence *tending* to prove James & Neer's case, the charge of the court was erroneous. *Dick v. Railroad Company*, 38 Ohio St. 389; *Whelan v. Kinsley*, 26 Ohio St. 131; *Turner v. Turner*, 17 Ohio St. 449; *Richardson v. Curtiss*, 33 Ohio St. 339.

II. Ignoring the question of custom, set out in the answer and proved on the trial, we confidently claim that the transaction of delivering the wheat at the warehouse, commingling it with other wheat of like kind therein, without any agreement to sell, and receiving weigher's receipts therefor, of the character taken, create a bailment, and not a sale.

Inglebright v. Hammond, 19 Ohio, 337, 346; 6 Am. Law Rev., pages 467, 469; 24 Am. Dec. 143, 155; Story on Agency, 229; *Chase v. Washburn*, 1 Ohio St. 244; 2 Kent's Commentaries, 13th ed., 365 and notes, 590 and notes; 2 Parsons on Contracts, 137; *Cushing v. Breed*, 14 Allen, 376, 380; *Young v. Miles*, 20 Wis. 615; *Mowry v. White*, 21 Wis. 417; *Young v. Miles*, 23 Wis. 643; *Stearns v. Raymond*, 26 Wis. 74; *Newton v. Howe*, 29 Wis. 531; *Kimberly v. Patchin*, 19 N. Y. 330; *Russell v. Carrington*, 42 N. Y. 118; *M. & M. Bank v. Hibbard*, 48 Mich. 118; *Ledyard v. Hibbard*, 48 Mich. 421; *Nelson v. Brown*, 44 Iowa, 455; *Irons v. Kentner*, 51 Iowa, 88; *Arthur v. C., R. I. & P. Railway*, 61 Iowa, 648; *Sexton & Abbott v. Graham*, 53 Iowa, 181; *Odell, assignee, v. Leyda*, 46 Ohio St. 244; Benjamin on Sales, sec. 1; Wells on Replevin, secs. 3, 203, 205.

III. If the transaction, as it appears by the weigher's receipt and otherwise, does not alone show the bailment of the grain, then the evidence of custom or usage would make the delivery of the grain a bailment. An established custom has the force of law. 2 Disney, 482; *Steel Works v. Dewey*, 37 Ohio St. 242; 15 Ohio St. 571; *Foster v. Robinson*, 6 Ohio St. 90; *Steel Works v. Dewey*, 87 Ohio St. 242; *Newhall v. Langdon*, 39 Ohio St. 87; *Lowe v. Lehman*, 15 Ohio St. 179; *Rodgers v. Woodruff*, 23 Ohio St. 632; 11 Ohio, 364, 367; *Irons v. Kentner*, 51 Iowa, 91; 77 Ills. 305; 87 Ills. 556.

West, Brown & West, for defendant in error.

In the case at bar, the warehouse receipts contain no suggestion of storage, bailment or risk. And nothing whatever was said by either of the parties in regard thereto. It was the delivery by the executor in the regular course of trade of a quantity of wheat to parties engaged in the business of buying, shipping and selling grain, and in no other business whatever. It must, therefore, be held to have been received by them in their regular course of business as merchants so engaged for the purpose of their trade, and therefore constituted a sale to them, unless the circumstances showed the contrary. Plaintiffs in error seek to avoid this by evidence of local custom, contending that by such custom the wheat when delivered was a mere bailment, and continued to be the property of the executor until he should present the weigher's receipt and demand payment therefor; that he had the option either to demand payment, or a return of the wheat, or demand and receive a regular storage certificate in the terms before set out, and that until he demanded payment, or a regular storage receipt, or a return of the wheat, the bailment was at his risk. Custom is the growth of usage continuously practised for a long period. 1 Bouvier's Dic. 359; *Inglebright v. Hammond*, 19 Ohio, 337.

Again, the claim that the holder of such weigher's receipts had the customary right to surrender it at pleasure and demand and have a regular storage certificate, is unsupported. Every such storage certificate was a special contract or agreement between the parties. It specially stipulated the length of time the grain might remain in store

free of charge ; that it should remain only at the owner's risk ; and that if he withdrew it five cents per bushel would be charged for handling the grain, together with regular storage charges for the time it remained. This is an express contract formally executed, and not an agreement created by or implied from custom or usage.

But if it were otherwise, the habit of giving such storage certificates when requested furnishes no evidence tending to prove that the grain represented by it was held in store previous to its issue, or was the property of him to whom issued previous thereto, while he held the weigher's certificate only. Such storage certificate might upon a sufficient consideration have been issued to any one who never had or delivered a bushel of wheat, and yet the parties to the certificate be bound by all its terms and stipulations precisely the same as in case of previous delivery by a customer. So if one delivering upon an actual sale, should afterwards change his notion and request a certificate of deposit, the merchants might assent and issue it, in which case it cannot be contended that the grain represented by the certificate had been previously held in store for, and as the property of, the holder of the weigher's certificate. An actual sale may be afterwards converted into a bailment, by stipulation and agreement of the parties. If the executor in the case at bar after delivery of the wheat in controversy had changed his purpose, and upon agreement with the merchant, accepted a storage certificate of the character before set out, it is quite clear that he could not have maintained this action on the authority of *O'Dell v. Leyda*. The certificate would have shown that at the time of the destruction of the warehouse his wheat was held in store at his own risk. But he never requested a storage certificate and never delivered any wheat as executor for the purpose of storage, but as upon a sale only. Where grain is delivered by a customer to a grain merchant engaged in the business of buying, shipping and selling grain, and nothing is said at the time for what purpose, the presumption is that a sale thereof is intended, and that the delivery is upon sale. If nothing be said about the price, the presumption is that it is a sale at the market price. Such was the case at bar.

For the distinction between a bailment and a sale, see Benjamin on Sales, sec. 2, note 1.

SPEAR, J. The question is: did the court of common pleas err in directing a verdict for the plaintiff below? If, as was assumed by that court, the undisputed evidence established that the transaction was a sale, then the direction was right, but if the whole evidence left a fair question as to whether it was a sale or a bailment, then the question should have been submitted to the jury.

It was shown by the evidence that the wheat was delivered by an employee of the plaintiff, at the warehouse of the defendants, on the 17th and 18th days of August, 1886, and received by a clerk or foreman employed at the warehouse, who, as the loads came, issued receipts in substance like the following :

"No. 1721.

DEGRAFF, O., August 17, 1886.

"JAMES & NEER.

"Received of J. C. Plank, (Administrator), load of wheat, 11 bushels, 5 pounds.

"Not transferable. Present this at office.

"J. H. McKINNIE, Weigher."

The wheat, when deposited, was mixed with other like wheat in the warehouse, some belonging to the defendants and some to others for whom it had been received in store.

On the 26th day of August, 1886, a fire occurred which consumed the warehouse and nearly all the wheat there at the time. The fire was without fault on the part of the defendants. At that time none of the receipts had been presented at the office. Shortly after the fire Plank demanded of James & Neer pay for all the wheat delivered, which was refused. They, however, tendered \$36.16 as his share of damaged wheat which had been sold after the fire.

Within the previous year Plank had delivered to the defendants at the same warehouse from eleven to twelve hundred bushels of wheat, for which he took weigher's receipts in form similar to the copy given, which he subsequently presented at the office and received in exchange storage receipts, a copy of one of which is as follows:

"JAMES & NEER,

"DEALERS IN GRAIN & SEEDS.

"No. 240.

DEGRAFF, O., January 5, 1886.

"Received of Joseph C. Plank, four hundred and fifty-two bushels and 35 pounds of wheat (452 35-100 bushels). Subject to the following rules:

"Storage free until June 1, 1886. One cent per bushel per month or any part thereafter. All grains stored at owner's risk. We will not be responsible for loss or damage in any way. Grain taken out of house by owners, five cents per bushel and usual storage.

"JAMES & NEER."

This wheat was subsequently sold to the defendants.

The evidence further tended to show that James & Neer were at the time, and had been for several years, engaged in storing wheat as warehousemen, as well as in buying and selling; that they sold and withdrew from the common mass, but never so much but that there was left sufficient to return to each depositor his proper quantity; and that, when the fire occurred, they had in the warehouse between 200 and 300 bushels of wheat in excess of the quantity necessary to satisfy all depositors, including Plank.

The evidence further tended to show the existence of a custom of dealing in vogue for many years at that and other warehouses in the neighborhood, of which Plank had knowledge, to the effect that grain deposited in the warehouse, for which weigher's receipts were given,

was regarded as grain in store until such receipts were presented at the office, when the owner had the option to exchange the weigher's receipts for a storage receipt and continue the storage upon the terms specified in that form of receipt, or to sell at the price ruling the day such weigher's receipts were presented; and that the receiving of the wheat and the giving of the weigher's receipts did not constitute a sale of the wheat, but that it remained the property of the depositor until the weigher's receipts were presented at the office and an election to sell made.

Let us examine and ascertain the effect of this evidence in order to determine the duty of the trial court with respect to it. The naked fact of the delivery of the wheat and the terms of the weigher's receipts are consistent with either a sale or a bailment. It being shown further, however, by plaintiffs' evidence that James & Neer were buyers and sellers only of grain, it might well be claimed that the delivery and the receipts imported a sale. But the added character of warehousemen presented a new question. This question would have been removed, and the plaintiffs' claim again sustained, had it appeared that James & Neer appropriated the grain to their own use by shipping, so as not to leave a quantity sufficient to satisfy depositors, for, in such case, it might fairly be presumed that the owner and receiptor had agreed upon a sale to the latter. Besides, while the mere option to elect to treat a bailment as a sale at some future time does not deprive it of its character of a bailment (*Colton v. Wise*, 7 Ill. App. 395; *Plow Co. v. Porter*, 82 Mo. 23; *Ledyard v. Hibbard*, 48 Mich. 421), yet, where the depository appropriates to his own use more than his proportion of the common mass the depositor may elect to treat the transaction as a sale, and demand pay for the wheat delivered. So that if at all times James & Neer left enough to return to each depositor, including Plank, his proper quantity, the depositors remained tenants in common of the mixed mass, each entitled to such proportion as the quantity placed there by him bore to the whole mass, and Plank, if a depositor originally, would remain such, because the mere fact that the warehousemen mixed the wheat of all of like quality in one common mass and shipped and sold, from time to time, from the mass, their proportion only, would not work a change in the ownership of the wheat, and it would follow that the fact of mingling and of such shipping and sale would not determine that the transaction was a sale rather than a bailment. *Inglebright v. Hammond*, 19 Ohio, 337; *Chase v. Washburn*, 1 Ohio St. 244; *Odell v. Leyda*, 46 Ohio St. 244; *Rice v. Nixon*, 97 Ind. 97. No doubt whatever exists that the warehouseman may become a tenant in common like any other depositor, and may be permitted to enjoy the same right of severance without affecting the title of his co-tenants. *Seaton & Abbott v. Graham*, 53 Iowa, 181. So that further proof was necessary to ascertain to which class the transaction belonged.

No one will doubt that the parties were competent to make a contract either of sale or of bailment. And the parties having failed to make either directly, by spoken words or in writing, the circumstances sur-

rounding the transaction and the parties at the time were to be resorted to in order to ascertain the real character of the business done. So, evidence having been given tending to show that the defendants were warehousemen as well as buyers of grain, if a custom of trade prevailed in the community, certain, definite and uniform, and so notorious that it might be presumed to have been known to the plaintiff, throwing light on the understanding of the parties, and tending to show in which capacity the defendants received the wheat, that was competent to be considered. *Ledyard v. Hibbard, supra*. Such custom might give color to the otherwise doubtful acts of the parties so as to aid in arriving at their understanding, and it was necessary to ascertain that understanding in order to determine the legal effect of the transaction between them. This is the precise purpose and office of proof of a custom. *Inglebright v. Hammond, supra*. It in no way can be said to change the law. On the contrary, it may aid in determining the law.

The trial court assumed, that, upon the undisputed facts, a sale was conclusively shown, and that a question of law only remained. In this, we think, the court erred. Upon the whole evidence intelligent minds might reach a different conclusion, and wherever that state of the evidence exists it presents a case for the jury, under proper instructions. If the jury should find, from the evidence, that the understanding between the parties was that James & Neer were to mingle the wheat received of Plank with other wheat and sell and ship at their pleasure, and that the direction in the weigher's receipts to "present this at office" was for the purpose only of indicating to the holder where he could get his pay, or, if the understanding was that they were to mingle the wheat with other wheat of like kind and sell only their own proportion, keeping enough for all depositors, and yet, in disregard of this, they actually did sell at their pleasure, not leaving enough on hand for depositors, then the verdict for the plaintiff as rendered would have been justified. But if, on the other hand, the jury should be satisfied from the evidence that the custom as claimed by defendant actually existed, was known to plaintiff, and from it and other facts appearing, that the understanding was that though the wheat might be mingled with other wheat belonging in part to depositors and in part to defendants, yet that defendants were to sell from the common mass, from time to time, their proportion only, leaving sufficient on hand to satisfy all depositors, and the defendants observed this understanding; and especially if, in addition to the foregoing, they found further that the distinct understanding of the parties was, by virtue of said custom, that the wheat was to be regarded as in store until Plank should elect to make a sale of it, then, it appearing that no demand for the pay had been made by presentation of receipts at the office, or otherwise, before the fire, the jury would have been justified in finding for the defendants.

It is insisted that the court below is sustained by the case of *Chase v. Washburn, supra*. We think not. In that case Washburn delivered

to Chase several hundred bushels of wheat, taking receipts, as delivered, expressing that the wheat was "received in store." The wheat was delivered between October, 1847, and August, 1849. In May, 1850, demand was made for either wheat or money, which was refused. Washburn's evidence tended to prove further that he had instructed his agent who delivered the wheat not to sell unless he could get a dollar per bushel, and if he could n't get that to leave it in store, though it did not appear that this instruction was communicated to Chase; that Chase was informed that Washburn had five or six hundred bushels to draw, and, when the first load was delivered, that Chase said they would pay the highest market price when Washburn should call for it. Chase's evidence tended to show that his warehouse was burned October 26, 1849, and that there was consumed in it sufficient wheat to answer all outstanding receipts. Also, that the custom at Milan was to store all wheat received in a common mass and to ship from the same as occasion required, which was known to Washburn, and that the custom also was, when parties called for their pay, either to pay the highest market price, or deliver wheat to the holder of the receipt. Washburn's rebutting evidence tended to establish that Chase had not sufficient wheat in his warehouse at the time of the fire to answer all his outstanding receipts, and that the warehouse was emptied of all wheat between the last receipts given Washburn and the time of the fire.

The gist of the defendant's claim as to the law was summed up in his request to charge as follows: That the "custom at Milan, if known to Washburn, in the absence of an express contract, became a part of the contract between the parties, and if the jury should find that Chase had sufficient wheat on hand at the time of the fire to answer all his outstanding receipts, that he was not liable, and that neither the mingling of the wheat nor the shipment of it would make him liable if he had sufficient amount on hand at the time of the fire to answer his outstanding receipts." This the court refused to give, but charged the converse of the proposition.

It is manifest that the strongest position Chase could claim was that the transaction was a *mutuum*. It left Chase the right to sell and ship at his pleasure, and pay either in money or wheat. The practical effect of a *mutuum* must always be to transfer the title of the chattels deposited. Otherwise the depositary would not have the unqualified right to sell. The custom introduced lacked definiteness as to one feature of it, and, taken altogether, imputed a sale. Hence it was proper for the court to refuse to charge as requested. The charge as given was correct, and the verdict being for plaintiff, he was entitled to judgment. And the affirmation of the judgment was clearly right. The reasons for the decision stated by Bartley, J., in the opinion, are given with the usual clearness and learning of that eminent jurist, and nothing further need be added.

A sufficient distinction between *Chase v. Washburn* and the case at bar is that, while in the former case the evidence relied on by Chase

tended to prove that the warehouseman was to have the right to sell upon the condition only that he have wheat enough on hand to satisfy Washburn when he should call, or pay money, in the present case the evidence relied on by the warehousemen tended to prove that they were to have the right to sell only their own portion of the common mass, and sold no more than that, having at all times prior to the fire enough to satisfy all the depositors. In the one case the defendant's own evidence disclosed that the title to the wheat passed; in the other, if the defendants' claim was established, it did not pass.

*Judgment reversed.*¹

¹ "In the cases which we have now gone over the argument is very strong that there is a sale to the owners of the elevator, and it has already been fully stated. At the same time it cannot be denied that if the law is so, it will be followed by injustice and inconvenience. Undoubtedly those who deliver grain to an elevator think they have something more than the personal liability of the warehouseman, and regard him as their bailee in charge of their property. The holders of accepted orders look upon them as representing property in like manner. If the transaction is regarded as a sale, the safety of receipt-holders depends upon the warehouseman's solvency; if the doctrine which will be advocated here prevails, they run no risk unless he is both insolvent and dishonest. Of course, the opinion of merchants as to the nature of the transaction is not conclusive. As is observed by the Lord Justice James in a late case, 'there is no magic in the word "agency." It is often used in commercial matters, when the real relation is that of vendor and purchaser.' *Ex parte White. In re Nevill*, L. R. 6 Ch. 397, 399. But it is undoubtedly desirable to work out the expectations and intentions of the parties if the machinery of the law admits it. Suppose that warehousemen became insolvent, having always been careful to keep a quantity of grain in store corresponding to the amount for which they had receipts out, would not the holders of the receipts have a right to feel that they were unjustly treated, unless they were preferred to the general creditors in their claim upon that grain? Let us look at it a little more exactly.

"Suppose I deliver a copy of the General Statutes of Massachusetts, or other book easily purchasable in the market, to an agent to keep, telling him, however, that he may sell it at any time, provided that he will immediately appropriate another copy to me upon doing so, and give him like power of sale and substitution as to all succeeding copies. The title in the copy for the time being appropriated to me, to be vested in me. Is not that a perfectly possible transaction? The analogies of the law show that the title to a substituted volume would vest in me as soon as it was definitely appropriated to me. *Aldridge v. Johnson*, 7 El. & Bl. 885, 898, per Lord Campbell, C. J.; *Langton v. Higgins*, 4 H. & N. 402.

"Would it make any difference if the agent also had power to mix the volume with others belonging to third persons, from which it was not distinguishable, each owner being at liberty to call for one at any time? Would it make any difference that he was at liberty to add others of his own, if he was only at liberty to withdraw as many as he put in?"—6 Am. Law Rev. 464, 465.

See *Lyon v. Lenon*, 106 Ind. 567; *Sexton v. Graham*, 53 Iowa, 181; *Barnes v. McCrea*, 75 Iowa, 267; *Hall v. Pillsbury*, 43 Minn. 33; *Bretz v. Diehl*, 117 Pa. 589. For the rule in cases of accidental confusion, see *Spence v. Union Marine Ins. Co.*, L. R. 3 C. P. 427; *Moore v. The Erie Railway Co.*, 7 Lansing, 39.

B. *Tortious.*

ANONYMOUS.

QUEEN'S BENCH. 1593.

[*Reported Pop. 38, pl. 2.*]

IN trespass for carrying away certain loads of hay, the case happened to be this: The plaintiff pretending title to certain hay which the defendant had standing in certain land, to be more sure to have the action pass for him, took other hay of his own (to wit, the plaintiff) and mixed it with the defendant's hay, after which the defendant took and carried away both the one and the other that was intermixed, upon which the action was brought, and by all the court clearly the defendant shall not be guilty for any part of the hay, for by the intermixture (which was his own act) the defendant shall not be prejudiced as the case is, in taking the hay. And now the plaintiff cannot say which part of the hay is his, because the one cannot be known from the other, and therefore the whole shall go to him who hath the property in it with which it is intermixed, as if a man take my garment and embroider it with silk, or gold, or the like, I may take back my garment, but if I take the silk from you, and with this, face or embroider my garment, you shall not take my garment for your silk which is in it, but are put to the action for taking of the silk from you.

So here, if the plaintiff had taken the defendant's hay and carried it to his house, or otherwise, and there intermixed it with the plaintiff's hay, there the defendant cannot take back his hay, but is put to his action against the plaintiff for taking his hay. The difference appeareth, and at the same day at Serjeants' Inn in Fleetstreet, the difference was agreed by Anderson, Periam, and other justices there, and this case was put by Anderson: If a goldsmith be melting of gold in a pot, and as he is melting it, I will cast gold of mine into the pot, which is melted together with the other gold, I have no remedy for my gold, but have lost it.

WARD v. AYRE.

KING'S BENCH. 1615.

[*Reported Cro. Jac. 366.*]

TRESPASS of assault and battery, *et quodd cumulum pecunie*, containing five marks, *cepit, &c.*

The case was, The plaintiff and defendant being at play, the plaintiff thrust his money into the defendant's heap and mixed it, and the

defendant kept it all; whereupon (they striving for the money) plaintiff brought this action.

The whole court were of opinion, in regard the plaintiff's own money cannot be known, and this his intermeddling is his own act, and his own wrong, that by the law he shall lose all; for, if it were otherwise, a man might then be made to be a trespasser against his will, by the taking of his own goods; therefore, to avoid that inconvenience, the law will justify the defendant's detaining of all: and so it is of an heap of corn voluntarily intermingled with another man's. Whereupon the rule of the court was, *quòd querens nihil capiat per billam*.

RYDER v. HATHAWAY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1838.

[Reported 21 Pick. 298.]

MORTON, J. delivered the opinion of the court.¹ This is trespass *de bonis asportatis*, in which the plaintiff claims to recover for twenty-three cords of wood.

It appeared in evidence that the defendant took a certain quantity of wood, but he justified the taking, on the ground that the plaintiff had cut and carried the wood from his land, and so that the wood was his, and he had a lawful right to take it. The wood in controversy was cut by the plaintiff and removed by him to a landing-place by the shore of the swamp, the soil of which was owned by the defendant. From this place the defendant carried it away. If the wood was really cut upon the defendant's land, the cutting and removing it by a wrong-doer would not divest him of his property in the wood, and he might lawfully remove it from the place where the plaintiff had put it.

The principal question in the case relates to the title of the land on which the wood grew.

Upon a careful revision, we are well satisfied, that in reference to the title, the instructions were correct, and the finding of the jury warranted by the evidence.

But in the next branch of the case we have found much greater difficulties.

It appeared that a part of the wood taken by the defendant had been cut and carried to the landing-place by the plaintiff from land indisputably his own. For this part he contended that he had a right to recover, however the title to the other lot might be decided. In relation to this part of the case the jury were instructed, that if "a part of the plaintiff's own wood was so mixed with the defendant's wood in

¹ The opinion states the facts. That part of the opinion relating to the question of title is omitted.

the same pile, either that the defendant did not know it or could not by any reasonable examination distinguish it, the taking of such part was not a trespass for which this action would lie." Now if, under any circumstances, the taking of wood thus mixed might be a trespass, this general instruction would need some qualification, and without it would be incorrect, and might mislead the jury. And although, in all other respects, the instructions are right, and this may need but a slight modification, yet even that, under our practice, must lead to a new trial.

Few subjects in the law are less familiar, or more obscure, than that which relates to the confusion of property. If different parcels of chattels, not capable of being identified, owned by different persons, get mixed, how are they to be severed? What are the relative rights of the different owners? Take, for example, grain or liquor. Can each one of the former owners take from the common mass his proportion, or do they become tenants in common of the whole? If one takes the whole, what shall be the remedy? Will trespass lie? If they become tenants in common, clearly not. There is some conflict on this subject between the common law and the civil law. If the intermixture takes place by accident, or without the fault of the parties, it would be very unreasonable to deprive either party of his property, or materially to affect his right to it. And yet oftentimes there must be great suffering, as by the confusion of property of different kinds and qualities, as of different kinds of grain or liquors, the intermixture of which would greatly impair, if not entirely destroy, the value of the whole. But it will not be useful further to consider the intermixture of property by accident, as it will not have much application to the case under consideration.

The cases of *intentional* intermixture present questions of greater perplexity. If the owners of goods incapable of being identified consent to intermix them, their consent makes them tenants in common. But if the property be wilfully and unlawfully intermingled, it clearly cannot constitute a tenancy in common, because a person cannot be made a tenant in common or copartner without his consent. The act of God or of the law may create such a confusion of the property of different owners, as necessarily to constitute a community of property between them. But no one person by his own act can compel another to become his cotenant.

By the rules of the civil law, if the intermixture was made wilfully and not by mutual consent, he who made it acquired the whole, and the only remedy for the other party was a satisfaction in damages for the property lost. Vinn. ad Inst. lib. 2, tit. 1, § 28. This rule seems to be very imperfect, as it would enable one person to acquire the property of another against his will, merely rendering himself liable to pay the value of it. But it undoubtedly went upon the ground, that the intermixture was a conversion, and, in this respect, is analogous to many cases of trover and trespass. But our law adopts an entirely opposite

rule. That very learned commentator, Chancellor Kent, in 2 Kent's Comm. 297, says "the common law, with more policy and justice, to guard against fraud, gave the entire property, without any account, to him whose property was originally invaded and its distinct character destroyed. If A will wilfully intermix his corn or hay with that of B, so that it becomes impossible to distinguish what belonged to A from what belonged to B, the whole belongs to B." *Hart v. Ten Eyck*, 2 Johns. Ch. R. 62.

But this rule only applies to wrongful or fraudulent intermixtures. There may be an intentional intermingling, and yet no wrong intended; as where a man mixes two parcels together, supposing both to be his own, or that he was about to mingle his with his neighbor's, by agreement, and mistakes the parcel. In such cases, which may be deemed accidental intermixtures, it would be unreasonable and unjust that he should lose his own, or be obliged to take his neighbor's. If they were of equal value, as corn, or wood, of the same kind, the rule of justice would be obvious. Let each one take his own given quantity. But if they were of unequal value the rule would be more difficult. And if the intermixture was such as to destroy the property, the whole loss should fall on him whose carelessness or folly or misfortune caused the destruction of the whole. This doctrine is recognized and discussed by Lord Eldon, in *Lupton v. White*, 15 Ves. 432. See also *Panton v. Panton*, cited in 15 Vesey, 442; Story on Bailments, § 40; Ayliffe's Pand. lib. 3, tit. 3, p. 291; Ersk. Inst. bk. 2, tit. 1, § 17; 2 Dane's Abr. 119.

The intentional and innocent intermixture of property of substantially the same quality and value, does not change the ownership. And no one has a right to take the whole, but in so doing commits a trespass on the other owner. He should notify him to make a division, or take his own proportion at his peril, taking care to leave to the other owner as much as belonged to him. It must already have been perceived that these principles are not perfectly consistent with the unqualified rule laid down for the government of the jury.

According to the above doctrine, if the plaintiff actually supposed that the land from which the wood was taken was his own, and that all the wood was his, then the mingling it together should not divest him of that which honestly belonged to him. But if he knew that the land was not his, or if he doubted whether it was his or not, and mixed the wood with an intent to mislead or deceive the defendant, and to prevent him from taking his own without danger of taking the plaintiff's, then he has by his own fraudulent act lost his property and can have no remedy. But if, as above stated, the plaintiff mingled the wood from the different lots supposing all of it to be his own, and if the defendant, knowing that some part of the wood came from the plaintiff's land, took the whole, he was a trespasser and is responsible in this action for the value of the plaintiff's wood thus taken by him. But if the defendant took the wood without any knowledge that any of it be-

longed to the plaintiff, then he is not liable in an action of trespass, though he may be in *assumpsit* if he has sold the wood, or if not, in trover, after a demand and refusal. *Bond v. Ward*, 7 Mass. R. 127.

The verdict must therefore be set aside and a new trial granted. But as the question of title has been fully and fairly tried and settled, there can be no reason for retrying that, and the new trial must be confined entirely to the question of damages.

Coffin and *Ezra Bassett*, for the plaintiff.

Warren and *Eliot*, for the defendant.

HESSELTINE v. STOCKWELL.

SUPREME COURT OF MAINE. 1849.

[*Reported 30 Me. 287.*]

TROVER, for a quantity of pine mill logs.

At the trial before *Wells, J.*, the plaintiff introduced testimony tending to prove, that in the winter of 1844-5, one Leander Preble, cut on his own land about 600,000 feet of pine lumber, and also cut on the land of the plaintiff, wrongfully and wilfully, about 100,000 feet of lumber of a similar quality, all of which lumber was marked with the same mark, and indiscriminately hauled and landed on the same landing place. That in the spring of 1845, said lumber was run down the stream and came into the possession of Franklin Adams & Co., and a part of it was taken to market, and the other part remained in the stream, and was subsequently sold by them to the defendant, who in the spring of 1846, ran to market all the residue of said lumber, excepting that in controversy, which consisted of about 100,000 feet that had remained behind, and in November, 1846, was seized by the plaintiff.

Soon afterwards the defendant took this lumber out of the plaintiff's possession, for which taking this action is brought.

There was evidence introduced by the defendant that Preble had cut on the plaintiff's land only about 7,000 feet, for which he had given his note. And there was much evidence from both parties as to the cutting.

The Court instructed the jury that the plaintiff must prove that the logs for which he claimed damages in this action, had been cut on his land, and had been taken by the defendant; and that the plaintiff was entitled to recover for any logs cut by said Preble on the plaintiff's land, and which were taken by the defendant, unless said Preble had paid the plaintiff therefor; and that it did not appear that any question of confusion of property arose in the action.

A verdict was returned for the defendant.

Kent & Cutting, for plaintiff.

A. W. Paine, for defendant.

SHEPLEY, C. J. This was an action of trover brought to recover the value of certain pine logs.

The logs appear to have composed a part of a larger lot estimated to contain more than 600,000 feet, which were cut and hauled by Leander Preble. The case states that there was testimony tending to prove that Preble cut on his own land about 600,000 feet of pine lumber, and also cut on the land of the plaintiff about 100,000 feet of pine lumber of a similar quality, all of which logs were marked with the same mark and hauled and landed on the same landing place.

With other instructions the jury were instructed, "that it did not appear that any question of confusion of property arose in the action."

What will constitute a confusion of goods has been the subject of much discussion, and it has become a question of much interest to the owners of lands upon which there are timber trees, as well as to those persons interested in the lumbering business, whether the doctrine can be applicable to the intermixture of logs.

When there has been such an intermixture of goods owned by different persons, that the property of each can no longer be distinguished, what is denominated a confusion of goods has taken place. And this may take place with respect to mill logs and other lumber. But it can do so only upon proof that the property of each can no longer be distinguished. That the doctrine might be applicable to mill logs is admitted in the case of *Loomis v. Green*, 7 Greenl. 393. The case of *Wingate v. Smith*, 20 Maine, 287, has been alluded to as exhibiting a different doctrine; but the case does not authorize such a conclusion. The instructions were, "that merely taking the mill logs and fraudulently mixing them with the defendant's logs would not constitute confusion of goods." These instructions were, and clearly must have been approved; for an additional element was required that the mixture should have been of such a character that the property of each could no longer be distinguished. The opinion merely refers with approbation to the case of *Ryder v. Hathaway*, 21 Pick. 298, and says, "the principles there stated would authorize the instructions which were given on that point in this case."

The common law in opposition to the civil law assigns the whole property without liability to account for any part of it to the innocent party when there has been a confusion of goods, except in certain cases or conditions of property. Chancellor Kent correctly observes that the rule is carried no further than necessity requires. 2 Kent's Com. 365.

There is therefore no forfeiture of the goods of one who voluntarily and without fraud makes such an admixture. As when, for example, he supposes all the goods to be his own, or when he does it by mistake.

And there is no forfeiture in case of a fraudulent intermixture when the goods intermixed are of equal value. This has not been sufficiently noticed, and yet it is a just rule and is fully sustained by authority. Lord Eldon, in the case of *Lupton v. White*, 15 Ves. 442, states the law of the old decided cases to be, "if one man mixes his corn or flour with that of another and they were of equal value, the latter must have the given quantity; but if articles of a different value are mixed, producing a third value, the aggregate of the whole, and through the fault of the person mixing them, the other party cannot tell what was the original value of his property, he must have the whole." This doctrine is stated with approbation by Kent. 2 Kent's Com. 365. It is again stated in the case of *Ryder v. Hathaway*. The opinion says, "if they were of equal value, as corn or wood of the same kind, the rule of justice would be obvious. Let each one take his own given quantity. But, if they were of unequal value, the rule would be more difficult."

In the case of *Willard v. Rice*, 11 Met. 493, the question, whether palm-leaf hats, which were intermixed, were of equal value, does not appear to have been, although it would seem that it might have been, made. The case is not therefore opposed to the doctrine here stated. The doctrine is noticed in the cases of *Hart v. Ten Eyck*, 2 Johns. Ch. 62; *Ringgold v. Ringgold*, 1 Har. & Gill, 11; *Brackenridge v. Holland*, 2 Blackf. 377.

If no logs were cut upon land owned by the plaintiff, no question could have arisen of confusion of goods. The jury were required by the instructions to find only, that none of those taken by the defendant were cut on the plaintiff's land. They were not required to find that no logs, composing the whole lot of six or seven hundred thousand feet, were cut on the plaintiff's land.

If Preble wrongfully cut any logs on land owned by the plaintiff, and mixed them with logs cut on his own land, so that they could not be distinguished, a question respecting confusion of goods might properly have arisen. The admixture might have been of such a character that the whole lot of logs, including those in the possession of the defendant, might have become the property of the plaintiff. Or it might have been of such a character, the logs being of equal value, that the plaintiff would have been entitled to recover from any one in possession of those logs or of a part of them, such proportion of them as the logs cut upon his land bore to the whole number.

While the facts reported might not necessarily prove a confusion of goods, if part of the whole lot of logs were cut upon land owned by the plaintiff, they might have been sufficient to raise that question, and to present it for the consideration of the jury.

The instructions therefore, when considered together, requiring the plaintiff to satisfy the jury that some of that particular portion of the whole lot of logs, which the defendant had in his possession, were cut upon land owned by the plaintiff, and that no question of confusion of property appeared to arise, were too restrictive. They may have deprived the plaintiff of the right to recover upon proof that some of

the logs composing the whole lot had been cut upon his land and so mixed with logs cut on land owned by Preble that they could not be distinguished.

*Exceptions sustained, verdict set aside, and new trial granted.*¹

BRYANT v. WARE.

SUPREME COURT OF MAINE. 1849.

[Reported 30 Me. 295.]

TRESPASS *de bonis asportatis*, for a quantity of cedar railroad sleepers, juniper knees, shingles, and juniper timber.

At the trial, before *Wells, J.*, it appeared, that the lumber was cut in the winter of 1840-41, by one Samuel Potter, a part on the land of defendant, and a part on land of Timothy Boutelle, the two tracts being contiguous in the town of Alton. The timber was hauled by Potter into a brook, for the purpose of being floated to market, and in the following spring, it was run down to the Penobscot river above the town of Orono, where it was rafted into eleven rafts, six of which were run to Bangor immediately afterwards, and delivered by Potter to plaintiff, to be held by him to pay what Potter owed him, and the balance to be paid to Potter, the plaintiff having supplied Potter while cutting the lumber. The other rafts were taken by defendant near Oldtown as his property, and soon afterwards he came to Bangor, and took the remaining six rafts out of the possession of plaintiff.

Potter was a trespasser on both tracts, and there were no marks upon any of the timber.

With other rulings, the court instructed the jury, that if a part of the lumber was cut on Ware's and a part on Boutelle's land, and was all mixed together in such a manner, by those who cut it, that the part cut on Ware's land could not be distinguished from what was cut on Boutelle's land, then Ware had a right to take the whole, and this action of trespass could not be maintained; also, that if the rafts taken by the defendant near Oldtown contained more than all the timber cut from his land, it would make no difference where he took it (he intending to take all the timber cut as aforesaid), if they found that the timber was intermingled, and could not be distinguished, as before stated.

The jury returned a verdict for defendant, and the plaintiff excepted.

Kelley and McCrillis, for plaintiff.

1. The rule of law, that where one mixes his own with another's goods so that it is impossible to distinguish and identify what belonged to each, the entire property passes to him, whose original dominion was

¹ See *Mayer v. Wilkins*, 37 Fla. 244, 253; *Claflin v. Continental Works*, 85 Ga. 27; *Hawkins v. Spokane, &c. Co.*, 33 Pac. 40 (Idaho); *First Nat. Bank v. Scott*, 36 Neb. 607; *Jewett v. Dringer*, 30 N. J. Eq. 291.

invaded, applies only to cases of fraudulent intermixture of goods. 21 Pick. 305. Fraud is not to be presumed, and whether there was any fraud, was a question which should have been submitted to the jury.

2. If there was fraud in Potter, who cut the lumber and intermingled it, the plaintiff being an innocent purchaser, is not to be affected by it. 14 Mass. 137; 10 Johns. 185; 20 Pick. 247; 6 Shepl. 391; 1 Peters, 46.

3. Where one innocently mixes his own with another's goods, each retains his ownership in his proportion, and neither party has a right to retain or take more than his proportion, and if one takes more than his proportion, he is a trespasser. 11 N. H. 558; 21 Pick. 306.

4. The articles, for which this action is brought, are not that kind of property, to which the law of confusion of goods applies. Inst. Lib. 2, title 1, § 27; Story on Bailments, § 40; 15 Vesey, 432; 20 Maine, 287.

5. The instruction should have been qualified, that if defendant knew he was taking lumber, which did not belong to him, he was responsible in trespass.

6. If there could be no division of the identical goods, there should be a division in value. Defendant having taken five rafts at Oldtown, and that being more than his share, was a trespasser in coming to Bangor and taking plaintiff's share.

Kent and A. W. Paine, for defendant.

HOWARD, J. This was an action of *trespass de bonis asportatis*, for a quantity of cedar railroad sleepers, juniper knees, shingles, and juniper timber. There was evidence, as stated in the exceptions, tending to show that the lumber was cut in the winter of 1840-41, by Samuel Potter, a trespasser, on two contiguous tracts of land, and hauled into a brook, to be floated down to a market. That one of the tracts of land was owned by the defendant, and that the other, called the college land, was owned by Timothy Boutelle. That in the spring following, the timber was run down to the Penobscot river and rafted into eleven rafts, six of which were run to Bangor, immediately after by Potter, and "delivered to the plaintiff to pay him what Potter owed him, and the balance to be paid to Potter (the plaintiff having supplied Potter while cutting the lumber)". "That Potter was a trespasser on both lots, on which he cut the timber;" and that "there was no other intermingling of the timber cut from both tracts, except that the logs were hauled into the same brook, at the same landing, and afterwards rafted into the same rafts, there being no marks on any of the timber."

The defendant took the five rafts at Oldtown, as his property, and soon after took the remaining six rafts out of the possession of the plaintiff, at Bangor.

The instructions to the jury, to which exceptions were taken and urged in the argument, were:—

1. That, if a part of the lumber was cut on the defendant's land, and a part on the college land, and the whole was mixed together in such a manner, by those who cut it, that it could not be distinguished, the defendant had a right to take the whole, and that this action of trespass could not be maintained.

2. That if the defendant did take the five rafts at Oldtown, and if they amounted to more than all of the timber cut from his land, it would make no difference where he took it, if he intended to seize all of the timber cut as before mentioned, if they found that it was intermingled, and could not be distinguished as before stated.

If one take the goods of another, as a trespasser, he does not thereby acquire a title to them, and cannot invest another with a title; but the original owner may follow his property and reclaim it from the trespasser, or any other person claiming through him, so long as the identity can be established.

If the timber taken by Potter, as a trespasser, from the land of the defendant, was so mingled with the other timber taken by him from the college land, that it could not be distinguished, it would produce what is denominated a confusion of goods. *Loomis v. Green*, 7 Greenl. 393; *Wingate v. Smith*, 20 Maine, 287; *Hazeltine v. Stockwell*, 30 Maine, 237; *Ryder v. Hathaway*, 21 Pick. 298; *Willard v. Rice*, 11 Metc. 493; *Betts v. Lee*, 5 Johns. 348; *Curtis v. Groat*, 6 Johns. 168; *Babcock v. Gill*, 10 Johns. 287; *Brown v. Sax*, 7 Cowen, 95; *Treat v. Barber*, 7 Conn. 280; *Barron v. Cobleigh*, 11 N. H. 558.

Where the confusion or commixture of goods is made by consent of the owners, or by accident, and without fault, so that they cannot be distinguished, but the identity remains, each is entitled to his proportion.

This was also the doctrine of the civil law. (Just. Inst. Lib. 2, tit. 1, §§ 27, 28.)

But if such intermixture be wilfully or negligently effected by one, without the knowledge or approbation of the other owner, the latter would be entitled by the common law to the whole property, without making satisfaction to the former, for his loss. The civil law, however, required the satisfaction to be made. *Browne's Civil Law*, 243; *Ward v. Ayre*, Cro. Jac. 366; 2 Black. Com. 405; 2 Kent Com. 363, 364, where the civil law is stated differently by the learned Chancellor, p. 364; *Story's Com. on Bailments*, § 40; *Lupton v. White*, 15 Vesey, 440; *Hart v. Ten Eyck*, 2 Johns. Chan. 62.

If the defendant found his timber, which had been wrongfully taken from his land, mingled with other timber, in the manner stated in the evidence, so that it could not be distinguished, he had clearly a right to take possession of the whole, without committing an act of trespass, even if he may be held to account to the true owner for a portion of it. He had, at least, a common interest in the property, and in taking possession he asserted only a legal right. Inst. Lib. 2, tit. 1, § 28; *Story's Com. on Bailments*, § 40.

In any view of the case, upon the facts presented, the instructions were correct.

*Exceptions overruled.*¹

¹ See *Norris v. United States*, 44 Fed. 735.

JENKINS v. STEANKA.

SUPREME COURT OF WISCONSIN. 1865.

[Reported 19 Wis. 126.]

ERROR to the Circuit Court for Winnebago County.

The action below was by Jenkins and others against Steanka, to recover possession of certain lumber, or the value thereof (alleged to be \$400), with damages for the detention. The plaintiffs obtained possession under the statute. Steanka was master of a sloop in which the lumber was found when seized by the sheriff; and claimed by his answer that the title to the lumber was in one Wright (for whom he was carrying the same on said sloop), subject to a lien for freight in favor of the owner of said sloop, and that said defendant, at the time of such seizure, was entitled to the possession as agent of said owner.

The jury found that defendant had the right of possession at the commencement of the action; that Wright owned the lumber; and that the value was \$360; and nominal damages. Judgment accordingly; and plaintiffs sued out their writ of error.

Earl P. Finch, for plaintiffs in error.

H. B. Jackson, for defendant in error.

By the Court, DOWNER, J. This is an action to recover forty thousand feet of pine lumber, alleged in the complaint to be wrongfully detained by the defendant, and of the value of \$400. The value is not denied by the answer. At the trial, the plaintiffs offered to prove the value less than \$400; but the Circuit Court refused to permit the evidence to be given, holding that the pleadings fixed and were conclusive as to the amount of the value. In this the court below erred. In actions of trover, trespass or replevin, before the Code, it was not necessary for the defendant to deny the amount of the value or the allegation of damages, and in this respect the Code has not altered the practice. They must be proved even though the defendant puts in no answer. *Conness v. Main*, 2 E. D. Smith, 314; *McKenzie v. Farrell*, 4 Bosworth, 202.

Questions were put to different witnesses by the plaintiffs during the progress of the trial, as to what the kind or quality of the lumber in dispute was. The court below refused to permit these questions to be answered. It seems to us the answers should have been received. They were competent as bearing on the question of the value of the lumber; also for another purpose. Testimony was given tending to prove that some part of the lumber in dispute was manufactured by one Wright, in his mill, at Fremont, out of logs belonging to the plaintiffs and cut on streams above Fremont, and that there was a great difference in the quality of lumber sawed out of logs cut at or near Fremont and that cut out of the plaintiffs' logs, the latter being much superior

in quality to the former. The defendants' witnesses, or some of them, testified that this lumber was made out of logs cut at Fremont. After this testimony was in, the plaintiffs renewed their inquiry as to the quality of the lumber in dispute, and the court again ruled the evidence inadmissible. It seems to us that it was clearly admissible as tending to prove whether the lumber in dispute was manufactured out of the plaintiffs' or Wright's logs.

The Circuit Court also erred in instructing the jury that "if they found for the plaintiffs, they could only recover the amount of lumber which they have proved to have been wrongfully taken by Wright, although it may have been commingled with the lumber of Wright wrongfully." The law, we think, is that if Wright wilfully or indiscriminately intermixed the lumber sawed from the logs of the plaintiffs with his own lumber, so that it could not be distinguished, and the lumber so mixed was of different qualities or value, then the plaintiffs would be entitled to hold the whole. *Willard v. Rice*, 11 Met. 493; 2 Kent's Com. (3d ed.), 364; *Ryder v. Hathaway*, 21 Pick. 298.

We do not deem it necessary to notice other rulings assigned for error of the court below excluding testimony, as the same questions may not arise upon a new trial.

Judgment of the court below reversed, and a new trial ordered.

SMITH v. MORRILL.

SUPREME COURT OF MAINE. 1869.

[Reported 56 Me. 566.]

TROVER, for a quantity of logs alleged to have been converted by the defendants in 1860. The writ is dated November 6, 1863.

There was evidence tending to show that, in the winter of 1858-9, the plaintiff lumbered on his township, called Holeb, adjoining which was the township called Forsyth, owned by the defendants; that the line between the townships was well marked and known to the plaintiff and his servants; that, during the operation, the plaintiff's servants, having cut all his timber accessible without removal of camps, breaking new roads, &c., intentionally and, without the knowledge or consent of the defendants, went upon the township of Forsyth, finished their operation thereon, hauled the logs to the same landing, and marked them with the same mark; that subsequently, after the plaintiff had learned all the facts of the trespass, together with the quantity of logs cut on Forsyth, from the return of his scaler, he caused the whole quantity to be put into the river, driven to Gardiner, caught, boomed, and rafted for sale, thus intermingling the logs in such a manner as to render it impracticable to separate those cut on Forsyth from those cut on Holeb; that the defendants, having no means of determining

the quantity of logs cut on their land, seized a quantity which they deemed sufficient to cover their loss ; that the plaintiff never, until the time of trial, informed the defendants of the quantity cut on Forsyth, although he had the means of doing so as early as April, 1859 ; that the defendants requested such information of the plaintiff, but did not receive it.

The court were to render such judgment as the legal rights of the parties required, upon the legal evidence reported.

S. Heath, for the plaintiff.

A. Libbey, for the defendants.

APPLETON, C. J. The plaintiff and defendants were owners of adjacent townships. The plaintiff trespassed upon the defendant's land, cutting thereon a considerable quantity of logs which were marked similarly to those cut on his own land, and were run with them to Gardiner.

The defendants having ascertained that the plaintiff had trespassed upon their land, seized a portion of the logs thus commingled, as cut on their premises, and more, as the plaintiff alleges, than were so cut. This action is brought to recover such excess.

As the plaintiff was a trespasser, the defendants had a legal right to seize the logs cut on their land wherever they could find them. Their title thereto was as perfect as if cut by themselves.

It was the fault of the plaintiff that they were so mingled by him or his agents with his logs so that they could not be distinguished from them. The plaintiff must suffer from the consequences of this confusion.

By the common law, where an intermixture of goods is fraudulently made without the knowledge of the owner, and they cannot be separated and identified, the latter is entitled to the whole property without making satisfaction to the former for his loss. In *Bryant v. Ware*, 30 Maine, 295, where lumber was cut upon two tracts of adjoining owners by a trespasser, and the whole was so intermixed by him, or persons claiming under him, that the part belonging to each owner could not be distinguished, and the owner of one tract seized and took possession of the whole, — it was held, that one claiming under the wrongdoer could not maintain an action of trespass for such taking.

But the defendants seized only a portion of the logs cut by the plaintiff. Waiving, therefore, their right to all, if they had such right in the present case, the question arises whether they are liable as wrongdoers if they seize more logs than, as it is ultimately shown, were cut on their land.

It has been repeatedly held that an officer has a right to attach the goods of another, negligently or fraudulently intermixed with those of the debtor, and hold them until they were identified by the owner and re-delivery demanded ; that he could not be treated as a trespasser for doing what he had a right to do ; and that, if after identification and demand for re-delivery he refused to give up the goods, he would be

liable for their value in trover, but that trespass could not be maintained for the original taking. *Bond v. Ward*, 7 Mass. 127; *Shumway v. Rutter*, 8 Pick. 443; *Willard v. Rice*, 11 Met. 493; *Lewis v. Whittemore*, 5 N. H. 366; *Taylor v. Jones*, 42 N. H. 36. So here the defendants had a right to seize their own logs. It was by the wrongdoing of the plaintiff that they were cut, marked, and intermingled with his own. The plaintiff knew the number and kind of logs cut on the defendants' land. The defendants were ignorant of all this, and were never informed thereof by the plaintiff, as they testify, till the time of the trial. They seized what they regarded as the number of logs cut on their land. If they seized logs not so cut, the plaintiff should have notified them of such fact and pointed out the specific logs he claimed, if it was in his power so to do. If they took more than they had a right to take, he should have advised them of the exact amount of his own trespass. He cannot claim that they are wrongdoers when they rightfully seized their own logs, wrongfully commingled by him with those cut on his land. This they clearly had a right to do. *Bryant v. Ware*, 30 Maine, 295. The party wrongfully intermingling his goods with another's cannot reclaim them without first pointing them out. *Seavy v. Dearborn*, 19 N. H. 351; *Gilman v. Sanborn*, 36 N. H. 311. So too if the defendants, acting in good faith, took more logs than the plaintiff had cut on their land, having a right to take all logs cut by trespassers, they would not be liable as wrongdoers until the plaintiff had pointed out the property belonging to him, and demanded it of them, which the defendants say was never done. It must be remembered that, if the plaintiff suffers, it is in consequence of his own wrongful acts. The defendants were acting for the protection of their acknowledged rights. *Judgment for defendants.*

KENT, WALTON, DANFORTH and TAPLEY, JJ., concurred.

NOTE. — The acquisition by a transferee of a chattel or obligation of a right greater than that of the transferor is dealt with later in this course under the head of Priority, and also in a separate course on Bills and Notes.

PICKERING v. MOORE.

SUPREME COURT OF NEW HAMPSHIRE. 1893.

[Reported 67 N. H. 533.]

TROVER, for manure. Facts found by the court. March 31, 1883, the defendant leased his farm for the term of three years to the plaintiff, who covenanted to carry on the place in a "husbandlike manner," and to consume and convert into manure, to be used or left upon the premises, all hay and fodder raised thereon. The plaintiff occupied the farm and performed all his covenants contained in the lease, without any new or further contract, until May 30, 1892. During the last year of his occupancy he fed out upon the farm a large quantity of fodder not produced on the place. He put twenty-five cords of the manure made from this fodder, and manure of the same quality and value made from fodder raised on the place, together, in a heap, where they were so intermixed that they could not be distinguished. The defendant prevented him from taking away the twenty-five cords.

Leach & Stevens, for the plaintiff.

Albin & Martin, for the defendant.

CARPENTER, J. The plaintiff held the farm after the expiration of three years, as tenant from year to year, upon the terms expressed in the lease. *Russell v. Fabyan*, 34 N. H. 218, 223; *Conway v. Starkweather*, 1 Denio, 113. Manure made upon a farm by the consumption of its products in the ordinary course of husbandry is a part of the realty. It cannot be sold or carried away by a tenant without the landlord's consent. *Sawyer v. Twiss*, 26 N. H. 345, 349; *Perry v. Carr*, 44 N. H. 118, 120; *Hill v. De Rochemont*, 48 N. H. 87, 88. The doctrine "was established for the benefit of agriculture. It found its origin in the fact that it is essential to the successful cultivation of a farm that the manure produced from the droppings of cattle and swine fed upon the products of the farm, and composted with earth and vegetable matter taken from the land, should be used to supply the drain made upon the soil in the production of crops, which otherwise would become impoverished and barren; and in the fact that the manure so produced is generally regarded by farmers in this country as a part of the realty, and has been so treated by landlords and tenants from time immemorial." *Haslem v. Lockwood*, 37 Conn. 500, 505.

Whether a tenant, "where there is no positive agreement dispensing with the engagement to cultivate his farm in a husbandlike manner, is bound to spend the hay and other like produce upon it as the means of preserving and continuing its capacity" (*Perry v. Carr* and *Hill v. De Rochemont*, *supra*), in other words, whether the express or implied obligation to cultivate the farm in "a husbandlike manner" binds him

as matter of law to convert into manure all the fodder grown on the premises, is a different and possibly an open question. *Wing v. Gray*, 36 Vt. 261, 266, 267; *Lewis v. Lyman*, 22 Pick. 437, 444, 445; *Mid-dlebrook v. Corwin*, 15 Wend. 169, and cases cited; *Brown v. Crump*, 1 Marsh. C. P. 567; *Legh v. Hewitt*, 4 East, 154, 159; *Moulton v. Robinson*, 27 N. H. 550, 561; Cool. Torts, 334, 343, 344. However that may be, no rule of good husbandry requires a tenant to buy hay or other fodder for consumption on the farm. If, in addition to the stock maintainable from its products, he keeps cattle for hire and feeds them upon fodder procured by purchase or raised by him on other lands, the landlord has no more legal or equitable interest in the manure so produced than he has in the fodder before it is consumed. It is not made in the ordinary course of husbandry. It is produced "in a manner substantially like making it in a livery stable." *Hill v. De Rochemont*, 48 N. H. 87, 90; *Corey v. Bishop*, 48 N. H. 146, 148. It is immaterial whether the additional stock is kept for hire, or is the tenant's property. *Needham v. Allison*, 24 N. H. 355.

The plaintiff did not lose his property in the manure by intermixing it with the defendant's manure of the same quality and value without his consent. It is not claimed that the plaintiff mixed the manure with any fraudulent or wrongful intent. "The intentional and innocent intermixture of property of substantially the same quality and value does not change the ownership. And no one has a right to take the whole, but in so doing commits a trespass on the other owner. He should notify him to make a division, or take his own proportion at his peril, taking care to leave to the other owner as much as belonged to him." *Ryder v. Hathaway*, 21 Pick. 298, 306; *Gilman v. Hill*, 36 N. H. 311, 323; *Robinson v. Holt*, 39 N. H. 557, 563; *Moore v. Bowman*, 47 N. H. 494, 501, 502; *Cheshire Railroad v. Foster*, 51 N. H. 490, 493. "Even if the commingling were malicious or fraudulent, a rule of law which would take from the wrongdoer the whole, when to restore to the other his proportion would do him full justice, would be a rule not in harmony with the general rules of civil remedy, not only because it would award to one party a redress beyond his loss, but because it would compel the other party to pay not damages, but a penalty." Cool. Torts, 53, 54.

Whether the parties were tenants in common of the manure is a question that need not be determined. *Gardner v. Dutch*, 9 Mass. 427, 430, 431; *Ryder v. Hathaway*, 21 Pick. 298, 305; *Chapman v. Shepard*, 39 Conn. 413, 425; *Kimberly v. Patchin*, 19 N. Y. 330, 341. Assuming that they were, the action may be maintained. A tenant in common has the same right to the use and enjoyment of the common property that he has to his sole property, except in so far as it is limited by the equal right of his co-tenants. Where two have each an equal title to an indivisible chattel, "as of a horse an ox or a cowe," neither, without actual and exclusive possession of the chattel, can enjoy his moiety. Simultaneous enjoyment by each of his equal right is

impossible. Hence, neither can lawfully take it from the possession of the other. The one excluded from possession has no legal remedy except to take it "when he can see his time." Lit., s. 323; *Southworth v. Smith*, 27 Conn. 355, 359.

A tenant in common of personal as well as real property has a right to partition if partition is possible, and if not, to a regulation of its use equivalent to partition or to a sale. Co. Lit. 164 b, 165 a; *Stoughton v. Leigh*, 1 Taunt. 402, 411, 412; *Morrill v. Morrill*, 5 N. H. 134, 135; *Crowell v. Woodbury*, 52 N. H. 613. On partition he is entitled to no particular part of the property, but only to his due proportion in value and quality of the whole. When it consists of chattels differing in quality and value, an appraisal of the value and a consideration of the qualities of the several chattels are essential to an assignment to each of his just share. In this case, as in that of a single indivisible chattel, if the parties cannot agree upon the use, sale, or division, judicial intervention is necessary. Until an adjudication of their rights, neither can assert a title in severalty to any portion of the property. When the common property is divisible by weight, measure, or number into portions identical in quality and value, as corn and various other articles, a different case is presented. There is no question of legal or equitable right. There is and can be no dispute that a court of law or equity can settle. Counting, weighing, and measuring are not judicial, but ministerial functions. Equity could do no more than decree that each might take so many pounds, bushels, or yards, or so many of the articles in number, and enforce its decree by process, in other words, enforce the conceded right. One may in general do without a decree what equity would decree that he might do. Neither law nor equity allows one in the exercise of his own rights to do an unnecessary and avoidable injury to another. One is entitled to the possession of the whole in those cases only where it is necessary to his enjoyment of his moiety. Here it is not necessary. There is no more difficulty in separating one portion from another, than there is in selecting A.'s marked sheep from B.'s flock. Either may make the division. The law is not so unreasonable as to compel a resort to the courts in order to obtain a partition which neither may make without expense and without danger of injustice to his co-tenant. Except in *Daniels v. Brown*, 34 N. H. 454, it has never been held, so far as observed, that a tenant in common is liable to his co-tenant in any form of proceeding for taking from the latter's possession and consuming or destroying his just proportion only of the common property. The conveyance by a tenant in common of a part of the common land by metes and bounds may effect a partition, and will if it does no injustice to his co-tenants, — if their just share can be assigned to them out of the remaining land. *Holbrook v. Bowman*, 62 N. H. 313, 321. No reason is perceived why a similar doctrine should not be applied in the case of a common tenancy of chattels. If A. and B. own in common one hundred horses, and B. sells ten of them to C., why should A. be permitted to take

them "when he can see his time," if he has possession of and can have his full share assigned to him from the remaining ninety? However that may be, a tenant in common of goods divisible by tale or measure may, without the consent and against the will of his co-tenant, rightfully take and appropriate to his sole use, sell, or destroy so much of them as he pleases, not exceeding his share, and by so doing effect *pro tanto* a valid partition. To this extent *Daniels v. Brown*, *supra*, is overruled. *Haley v. Colcord*, 59 N. H. 7, 8; *Gage v. Gage*, 66 N. H. 282, 288; *Seldon v. Hickock*, 2 Cai. 166; *Lobdell v. Stowell*, 51 N. Y. 70, and cases cited; *Stall v. Wilbur*, 77 N. Y. 158, 164; Cool. Torts, 455; 6 Am. Law Rev. 455-459, and cases cited. The defendant, by preventing the plaintiff from taking his part of the manure, exercised a dominion over it inconsistent with the plaintiff's rights. *Evans v. Mason*, 64 N. H. 98. *Judgment for the plaintiff*.¹

¹ See *Pratt v. Bryant*, 20 Vt. 337.

CHAPTER III.

TRANSFER OF RIGHTS IN PERSONAL PROPERTY.

SECTION I.

SATISFACTION OF JUDGMENT.

NOTE. — Other modes in which personal property is transferred without the consent of the person whose property is transferred are Forfeiture, Execution, Bankruptcy, and Marriage; as to the transfer of personal property on intestacy, see note to next section.

BRINSMEAD *v.* HARRISON.

COMMON PLEAS. 1871.

[*Reported L. R. 6 C. P. 584, 587-590.*]

JUNE 23. The judgment of the Court¹ (Willes and Montague Smith, JJ.) was delivered by

WILLES, J. We decided yesterday that, according to the law laid down by Lord Wensleydale in *King v. Hoare*, 13 M. & W. 494, a judgment in an action against one of two joint tort-feasors is a bar to an action against the other for the same cause. There remains, however, an entirely different question, which arises upon the new assignment, and which is, whether a judgment in trover, without satisfaction, changes the property in the goods so as to vest the property therein in the defendant from the time of the judgment, or of the conversion, or whether such recovery operates as a mere assessment of the value, on payment of which the property in the goods vests in the defendant. It is obvious that this is a different question from that which we have already disposed of; because, if the mere recovery vests the property in the defendant, the property is equally changed as to all strangers. It is a question which affects the transfer of property generally.

We are of opinion that no such change is produced by the mere recovery. The proceeding in such an action is not a proceeding *in rem*: it is, to recover *prima facie* the value of the goods. It may be that the goods have been returned, and the judgment given for nominal damages only. To say in such a case that the mere obtaining judgment vests the property in the defendant would be an absurdity. It is clear,

¹ The question which it is here desired to present is sufficiently given in the opinion.

therefore, that the judgment has no specific effect upon the goods. The only way the judgment in trover can have the effect of vesting the property in the defendant is, by treating the judgment as being (that which in truth it ordinarily is) an assessment of the value of the goods, and treating the satisfaction of the damages as payment of the price as upon a sale of the goods, according to the maxim in *Jenk. 4th Cent. Case 88*. Any other construction would seem to be absurd.

This question whether the property is changed by the mere recovery in trover appears to have led to much difference of opinion. The authority mainly relied upon by Mr. Powell was the dictum of Jervis, C. J., in *Buckland v. Johnson*, 15 C. B. 145, 157; 23 L. J. (C. P.) 204, in which that very learned and accurate judge did lay it down, upon the authority of a case in *Strange*, *Adams v. Broughton*, 2 Str. 1078, that the property is changed by the mere recovery, without any satisfaction. I would observe, however, that the case, as reported in *Strange*, is far from satisfactory. It is also reported in *Andrews*, p. 18, where the case is thus stated: "An action of trover was brought by the present plaintiff against one Mason, wherein he obtained judgment by default, and afterwards had final judgment; whereupon a writ of error was brought. And another action was now brought against Broughton by the same plaintiff, and for the same goods for which the first action was brought." An application appears to have been made to hold the defendant in the second action to special bail; and there was sufficient reason why special bail should not be allowed, because the judgment against Mason had the effect of preventing a second action being maintained against Broughton. The loose expressions of the Court, — that "the property of the goods is entirely altered by the judgment obtained against Mason, and the damages recovered in the first action are the price thereof; so that he hath now the same property therein as the original plaintiff had; and this against all the world," — were quite unnecessary. The same may be said as to the dictum of Jervis, C. J., in *Buckland v. Johnson*, 15 C. B. 145; 23 L. J. (C. P.) 204. That was an action against a person who jointly with his son had sold goods the proceeds of which the defendant had received. After the sale, the plaintiff (who claimed the goods), in ignorance that the father had received the money, brought an action against the son for money had and received and for damages for the conversion, and recovered a verdict for 100% against him; but, not succeeding in obtaining satisfaction, in consequence of the son's insolvency, he brought a second action against the father for the same causes. It is clear that the proceedings in the first action amounted to an election to treat the matter as a wrong, and precluded the plaintiff from bringing a fresh action for money had and received. It was equally clear that the judgment in the first action was a merger of the remedy against either the father or the son; and, when the action was brought against the father, the answer was obvious. It was wholly unnecessary, therefore, to decide, as suggested by Jervis, C. J., that the recovery in the first action changed the property; and

what was said was properly treated by the reporter as amounting only to a "*semble*."

On the other hand, there is a series of decisions showing that a mere recovery, without satisfaction, has not the effect of changing the property. In *Jenkins*, 4th Cent. Case 88, it is said: "A, in trespass against B for taking a horse, recovers damages; by this recovery, *and execution done thereon*, the property of the horse is vested in B. *Solutio pretii emptionis loco habetur*." That doctrine is acted upon in *Cooper v. Shepherd*, 3 C. B. 266; and, though the marginal note treats the *recovery* as changing the property, — a doctrine thrown out also in the note to *Barnett v. Brandao*, 6 M. & G. at p. 640, — the plea shows that the damages were satisfied; and the judgment of Tindal, C. J., shows that the property vests in the defendant only "on payment of the damages." To the same effect are the observations of Holroyd, J., in *Morris v. Robinson*, 3 B. & C. 196, at p. 206. "Where in trover," he says, "the full value of the article has been recovered, it has been held that the property is changed by judgment and satisfaction of the damages. Unless the full amount is recovered, it would not bar even other actions in trover." To the same effect is the note in 2 Wms. Saund. 47 c c, n. (z). It may also be proper to refer to the note to the case of *Holmes v. Wilson*, 10 Ad. & E. at p. 511, in which the law is stated by the reporters probably at the suggestion of one of the judges. The good sense of the thing and abundant authority thus appearing, we feel bound to give judgment for the plaintiff upon the new assignment.

In order, however, to act upon our judgment of yesterday and to-day, it must be recollected that the present defendant will not be liable except in respect of a wrong other than that which was the subject of the action against the other wrong-doer.

Another point arises upon the new assignment. The plaintiff may have acquired the property in the goods after the recovery of the judgment in the former action. As, however, that point was not argued, we prefer resting our judgment upon the main point.

The judgment therefore will be for the defendant upon the sixth plea, and for the plaintiff upon the new assignment.

Judgment accordingly.

Powell, Q. C. (*Joyce* with him), for the defendant.

Kelly, for the plaintiff.¹

¹ See s. c., L. R. 7 C. P. 547; *Ex parte Drake*, 5 Ch. D. 866.

SMITH v. SMITH.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE. 1872.

[Reported 51 N. H. 571.]

LADD, J.¹ The agreed statement of facts upon which the former opinion in this case was rendered (50 N. H. 212), showed that *after* this plaintiff had paid the judgment recovered against him for the original taking of the posts, &c., this defendant entered upon the plaintiff's premises and carried them away again. The defendant now offers to prove that his taking was *before* that judgment was paid, though after it was rendered; and we are called on to decide that the plaintiff cannot recover the value of the property which he thus paid for in paying that judgment, because it was taken from him by the defendant before instead of after the payment.

The defendant's position, in a word, is this: he had changed his security for the conversion of his property from an unliquidated claim for damages for a tort into a judgment for its value. Without releasing or surrendering that judgment, he broke and entered the plaintiff's close, and took away the property for which he held the judgment; and having thus secured the property, he enforced payment for its value by collecting the judgment. He now claims that he is not liable for its value in this action, because the property did not pass to the defendant until the judgment was paid, that is, after his taking.

If there were no other way of meeting this position, it would doubtless furnish a strong argument in favor of the former doctrine, that it is the judgment and not the satisfaction which passes the property. *Adams v. Broughton*, 2 Stra. 1078; and see cases collected in *Buckland v. Johnson*, 15 C. B. 145. Such is not the law, however, in this State — *Hyde v. Noble*, 13 N. H. 494 — and probably not now in England; *Brinsmead v. Harrison*, Law Rep. 6 C. P. 584; s. c. Law Rep. 7 C. P. 547; — and the aid of no such doctrine need be invoked.

In the former opinion it was said that a satisfaction of the judgment by this plaintiff passed the title of the property to him to take effect by relation from the time of the conversion.

That remark was not strictly called for as the case then stood; but we have no doubt it was correct, and it fully meets the case as now presented. 2 Par. Bills and Notes, 436; 1 Hilliard on Torts, 51; *Buckland v. Johnson*, *sup.*; *Hepburn v. Sewell*, 5 Har. & Johns. (Md.) 211. In the latter case the point was directly raised and distinctly decided by the court. The remarks of Dorsey, J., in delivering the judgment of the court, are so much in point that I quote a portion of

¹ The case is sufficiently stated in the opinion.

them. He says, — “It must be borne in mind that the plaintiff, in an action of trover, compels the defendant to become a purchaser against his will; and from what period does he elect to consider the defendant as a purchaser, or as answerable to him for the value of the thing converted? He selects the date of conversion as the epoch of the defendant’s responsibility, and claims from him the value of the property at that period, with interest to the time of taking the verdict. The inchoate right of the defendant as a purchaser must therefore be considered as coeval with the period of conversion, and this right being consummated by the judgment and its discharge, must, on legal and equitable principles, relate back to its commencement.”

This view disposes of the defendant’s case; for if, upon payment of the judgment, the property in the posts, &c., passed absolutely to the plaintiff, and his title thereupon took effect by relation from the date of the conversion, he is clearly entitled to recover their value in the present suit.

We do not undertake to say that there may not be cases where this doctrine would not apply. All we decide is, that it does apply in a case like the present.¹

MILLER v. HYDE.

SUPREME COURT OF MASSACHUSETTS. 1894.

[Reported 161 Mass. 472.]

REPLEVIN of a horse. Writ dated August 10, 1892. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on agreed facts, in substance as follows.

The horse in question was purchased in July, 1890, by Herbert W. Miller, a resident of Boston, through his agent, George Bryden, of Hartford, in the State of Connecticut, who thereafter kept it for him in Hartford. Miller died in September, 1890, and in the following November the plaintiff, who was his widow, having been appointed administratrix of his estate, demanded the horse of Bryden, who refused to deliver it to her, claiming to own a half interest therein. In March, 1891, Bryden sold and delivered the horse as his own property to Joseph C. Davenport and Ada L. Hyde, both residents of Connecticut.

Ancillary administration was subsequently granted to the plaintiff in Connecticut, and in November, 1891, she brought an action in that State against Bryden, Davenport, E. A. Hyde, and one Shillinglaw, for the conversion of the horse, which was in the possession of the three

¹ See *Fox v. Northern Liberties*, 3 W. & S. 103. Cf. also *Barb v. Fish*, 8 Blackf. 481; *Lovejoy v. Murray*, 3 Wall. 1. “If one declares in replevin for cattle with an *ad hoc detinet*, and defendant has judgment against him for damages, by payment thereof the property of the distress shall be vested in him.” Per HOLT, C. J., in *More v. Watts*, 12 Mod. 424, 428.

last named defendants, and attached the horse upon mesne process. She recovered judgment against Bryden only, on which execution was issued and delivered to an officer, who, after an ineffectual demand on Bryden for its payment, levied on the horse and advertised it for sale, but before he had sold it it was replevied from him by Davenport.

In August, 1892, Davenport intrusted the horse to the defendant, who brought it into this Commonwealth, where it was replevied by the plaintiff. When this action was begun, the judgment recovered in trover against Bryden, who was financially worthless, remained unsatisfied, and the replevin suit of Davenport against the officer was still pending in Connecticut.

The case was argued at the bar in December, 1893, and afterwards was submitted on the briefs to all the judges.

E. A. Whitman, for the plaintiff.

J. H. Morrison, for the defendant.

BARKER, J. The plaintiff may maintain replevin if she is the owner of the horse, and if she is not estopped from asserting her ownership against the defendant. As administratrix of her husband's estate, she was the owner when she brought trover in Connecticut against Bryden, the bailee, who had wrongfully usurped dominion, and sold and delivered the horse to Davenport. As the horse was in Connecticut and the action of trover was in the courts of that State, the effect of the suit upon her title would be determined by the law of the forum. But as the law of Connecticut is not stated as an agreed fact, we must apply our own. Whether a plaintiff's title to the chattel is transferred upon the entry in his favor of judgment in trover has not been decided by this court. Assuming that in early times title to the chattel was transferred to the defendant upon the entry of judgment for the plaintiff in trover, at present a different doctrine is generally applied, and it is now commonly held that title is not transferred by the entry of judgment, but remains in the plaintiff until he has received actual satisfaction; see *Atwater v. Tupper*, 45 Conn. 144; *Turner v. Brock*, 6 Heisk. 50; *Lovejoy v. Murray*, 3 Wall. 1; *Ex parte Drake*, 5 Ch. D. 866; *Brinsmead v. Harrison*, L. R. 7 C. P. 547; 1 Greenl. Ev. § 533 and note; and the law has been commonly so administered by our own trial courts. We think this doctrine better calculated to do justice, and see no reason why we should not hold it to be law.

Whenever the title passes, as there has been no sale or gift, and no title by prescription or by possession taken upon abandonment by the true owner, the transfer is made by his inferred election to recognize as an absolute ownership the qualified dominion wrongfully assumed by the defendant. The true owner makes no release in terms and no election in terms to relinquish his title; but the election is inferred by the law, to prevent injustice. Formerly this election was inferred when judgment for the plaintiff was entered, because his damages, measured by the value of the chattel and interest, were then authoritatively assessed, and the judgment brought to his aid the power of the court to enforce its collec-

tion out of the wrongdoer's estate or by taking his person ; and this was deemed enough to insure actual satisfaction. If so, it was just to infer that when he accepted these rights he elected to relinquish to the wrongdoer the full ownership of the chattel. An election was not inferred when the suit was commenced, although the plaintiff then alleged that the defendant had converted the chattel, and although the writ might contain a *capias*, because, owing to the uncertainties attendant upon the pursuit of remedies by action, it was not just to infer such an election while ultimate satisfaction for the wrong was but problematical. Forms of action are a means of administering justice, rather than an end in themselves. When it is seen that the practical result of a form of action is a failure of justice, the courts will make such changes as are necessary to do justice. If the entry of judgment in trover usually gave the judgment creditor but an empty right, it was not just to infer that upon acquiring such a right he relinquished the ownership of the chattel, and the rule that required the inference to be then drawn was properly changed. The ground for inferring such an election was that upon the entry of judgment he acquired an effectual right in lieu of his property, and the doctrine that without some actual satisfaction the inference of an election would not be drawn has been shown by experience to be necessary to the administration of justice, and has been generally acted upon, and the modern rule adopted that the plaintiff's title is not transferred by the entry of judgment, but is transferred by actual satisfaction. Trover is but a tentative attempt to obtain justice for a wrong, and until pursued so far that it has given actual satisfaction ought not to bar the plaintiff from asserting his title. The present doctrine is consistent with the general principle stated by Lord Ellenborough in *Drake v. Mitchell*, 3 East, 251, and quoted in *Vanuxem v. Burr*, 151 Mass. 386, 389, as approved in *Lord v. Bigelow*, 124 Mass. 185, that "a judgment recovered in any form of action is still but a security for the original cause of action until it be made productive in satisfaction to the party." Whether the holder of an unsatisfied judgment in trover can without a fresh taking maintain replevin against the same defendant, or is restricted to one action against the same person for a single tort, we do not now decide. See *Bennett v. Hood*, 1 Allen, 47; *Trask v. Hartford & New Haven Railroad*, 2 Allen, 331; *Bliss v. New York Central & Hudson River Railroad*, 160 Mass. 447. If he is so restricted, it is not because the ownership of the chattel has been transferred.

But the present plaintiff has done more than to take judgment in trover. In her action of trover she caused the horse to be attached upon mesne process, and since obtaining judgment she has caused the horse to be seized as property of Bryden in execution on the judgment as his property, and to be kept and offered for sale on the execution until, as it was about to be so sold, it was replevied by Davenport from the officer in a suit between them which is still pending in Connecticut. That suit is not a bar to this action, because it is not between the same

parties. *White v. Dolliver*, 113 Mass. 400; *Newell v. Newton*, 10 Pick. 470. But we must still inquire whether, assuming that the plaintiff's property in the horse was not transferred by her judgment in trover, it was transferred by that judgment taken in connection with the facts of the attachment and levy, and also whether she is estopped by the attachment and the levy from asserting her title in this action.

In the first place, the doctrine that a mortgagee of personalty who attaches the mortgaged goods on a writ against the mortgagor cannot afterwards enforce his mortgage, is not in point. The mortgagee is not the owner, but has merely a lien, and may well be held to relinquish that lien when by the attachment he establishes another. But if the plaintiff has actual ownership, and thus the full right to do with his own property as he may choose, merely procuring it to be attached on mesne process or seized on execution as the property of another does not work a change of ownership. The owner does not sell or give away his goods. In cases which are likely to occasion such conduct, there usually is, as in the present case, a disputed title; and it is with the hope of avoiding litigation over it that the real owner consents that the chattel shall for a special purpose only be treated as the property of another. This is "consistent with an intention ultimately to assert title should circumstances render it desirable for him so to do"; and he may well wait to see the issue, which may be such as to avoid the litigation of the question of title. See *Mackay v. Holland*, 4 Met. 69, 74; *Dewey v. Field*, 4 Met. 381, 384; *Johns v. Church*, 12 Pick. 557; *Bursley v. Hamilton*, 15 Pick. 40, 43; *Edmunds v. Hill*, 133 Mass. 445, 446. Nor is there any good reason why such a use of his own property by a plaintiff in trover should be held to divest him of his ownership when it would not have that effect in other forms of action. In trover he is in legal effect asserting by his suit that the title is and will remain in himself until he receives satisfaction on a judgment, and his subjection of the chattel to attachment or to seizure on execution is simply a use which he chooses to make of his own property which does not divest him of title or hamper him in the subsequent assertion of his ownership except by the rules of estoppel. The case of *Ex parte Drake*, above cited, is an authority to the point that a plaintiff who has brought an action of detinue and taken judgment both for the detention and the value of the chattel, and has also proved his judgment in bankruptcy after having had the chattel seized on execution as the defendant's property, may nevertheless assert his ownership and have process to restore to him the chattel *in specie*. In such cases courts look to substance rather than form, and do not by inferring an election or a waiver deprive of his property a plaintiff who has unfortunately resorted to some futile method of procuring redress.

In the present case, the natural construction to be put upon the plaintiff's conduct in attaching and beginning a levy upon her own horse in a suit asserting her ownership is, that, while she contended that in fact the horse was her own, she consented that, if litigation

as to the true state of title could be avoided by so selling the horse that the proceeds of the sale should be applied upon her claim for damages, she would in that event no longer assert her paramount title. Her implied offer not having been accepted, and Davenport having rendered impossible the accomplishment of her plan to avoid further litigation, she could thereupon say that all which had gone before was provisional upon the completion of the levy, and could enforce her right of property by any proper action against Davenport, or any one who might thereafter take wrongful possession of her horse, unless she was barred by the rules of estoppel.

Upon the question of estoppel, it is material to the decision of the present case to consider only whether she is estopped as to the present defendant or his principal Davenport. Whether she has rendered Bryden, or the officer who made the attachment or the levy in the Bryden suit, liable to costs, expenses, or chance of loss, is not material upon the question whether she is barred by the doctrines of estoppel from maintaining the present action. She is now prosecuting one of several successive wrongdoers for a fresh interference with the possession of her property; and neither the present defendant, Hyde, nor Davenport, for whom he claims to be acting as agent, has done or suffered anything, or been put to any liability by reason of which the plaintiff should be estopped from asserting her title. Upon the facts, Davenport in taking the horse in replevin did not rely upon the attachment or levy, but acted in denial of their validity; and Hyde is not shown to have been influenced by them in consenting to become Davenport's agent in keeping the horse, or in any manner. Neither Hyde nor Davenport is shown to have changed his position or course of conduct relying upon the plaintiff's action in causing the attachment or the levy, and the plaintiff is not estopped by it from maintaining the present action. In the opinion of a majority of the court, the result must be,

*Judgment set aside, and judgment for the plaintiff ordered.*¹

HOLMES, J. As the judges are not unanimous it becomes necessary for me to state my views, which otherwise I should not do, as they have not persuaded my brethren.

I am of opinion that the plaintiff ought to be barred in this action by her recovery of judgment in trover for the same horse. I am aware that the doctrine that title passes by judgment without satisfaction is not in fashion, but I never have been able to understand any other. It always has seemed to me that one whose property has been converted has an election between two courses, that he may have the thing back or may have its value in damages, but that he cannot have both; that when he chooses one he necessarily gives up the other, and that by taking a judgment for the value he does choose one conclusively. He

¹ See *Lovejoy v. Murray*, 3 Wall. 1; *Spivey v. Morris*, 18 Ala. 254; *Atwater v. Tupper*, 45 Conn. 144; *Jones v. Cobb*, 84 Me. 153; *Singer Mfg. Co. v. Skillman*, 52 N. J. L. 263; *Marsden v. Cornell*, 62 N. Y. 215.

cannot have a right to the value of the thing, effectual or ineffectual, and a right to the thing at the same time. The defendant is estopped by the judgment to deny the plaintiff's right to the value of the thing. Usually estoppels by judgment are mutual. It would seem to follow that the plaintiff also is estopped to deny his right to the value of the thing, and therefore is estopped to set up an inconsistent claim. In general an election is determined by judgment. *Butler v. Hildreth*, 5 Met. 49; *Bailey v. Hervey*, 135 Mass. 172, 174; *Goodyear Dental Vulcanite Co. v. Caduc*, 144 Mass. 85, 86; *Raphael v. Reinstein*, 154 Mass. 178, 179. I know of no reason why a judgment should be less conclusive in this case than any other. Of course, I am speaking of a judgment for the value of the chattel, not of one giving nominal damages for the taking. The argument from election is adopted in *White v. Philbrick*, 5 Greenl. 147, 150, which so far as I know is still the law of Maine, notwithstanding the remark in *Murray v. Lovejoy*, 2 Cliff. 191, 198. See also Shaw, C. J., in *Butler v. Hildreth*, 5 Met. 49, 53.

The most conspicuous cases which have taken a different view speak of the hardship of a man's losing his property without being paid for it, and sometimes cite the dictum in Jenkins, 4th Cent., Case 88, *Solutio pretii emptiois loco habetur*, which is dogma, not reasoning, or, if reasoning, is based on the false analogy of a sale; but they leave the argument which I have stated unanswered, not, as I think, because the judges deemed it unworthy of answer or met by paramount considerations of policy, but because they did not have either that or a clue to the early cases before their mind. *Lovejoy v. Murray*, 3 Wall. 1, 17; *Brinsmead v. Harrison*, L. R. 6 C. P. 584, 587; s. c. L. R. 7 C. P. 547, 554. It is not the practice of the English judges to overrule the common law because they disapprove it, and to do so without discussion. In *Brinsmead v. Harrison*, Mr. Justice Willes thought he was proving that the common law always had been in accord with his position. So far as the question of policy goes, it does not seem to me that the possibility — it is only the possibility — of an election turning out to have been unwise, is a sufficient reason for breaking in upon a principle which must be admitted to be sound on the whole, and for overthrowing the doctrine of the common law by a judicial fiat. I am not informed of any statistics which establish that judgments for money usually give the judgment creditor only an empty right.

That the view which I hold is the view of the common law I think may be proved by considering what was the theory on which the remedies of trespass and replevin were given. In Y. B. 19 Hen. VI. 65, pl. 5, Newton says: "If you had taken my chattels it is at my choice to sue replevin, which shows that the property is in me, or to sue a writ of trespass, which shows that the property is in the taker; and so it is at my will to waive the property or not." In 6 Hen. VII. 8, pl. 4, Vavisor uses similar language, and adds, "And so it is of goods taken, one may devest the property out of himself, if he will, by proceedings

in trespass, or demand property by replevin or writ of detinue," if he prefers. There is no doubt that the old law was that replevin affirms property in the plaintiff and trespass disaffirms it, and that the plaintiff has election. Bro. Abr. Trespass, pl. 134. 18 Vin. Abr. 69 (E). Anderson & Warberton, JJ., in *Bishop v. Montague*, Cro. Eliz. 824. The proposition is made clearer when it is remembered that a tortious possession, at least if not felonious, carried with it a title by wrong in the case of chattels as well as in the case of a disseisin of land, as appears from the page of Viner just cited, and as has been shown more fully by the learned researches of Mr. Ames and Mr. Maitland, 3 Harv. Law Rev. 23, 326. See 1 Law Quarterly Rev. 324. I do not regard that as a necessary doctrine, or as the law of Massachusetts, but it was the common law, and it fixed the relations of trespass and replevin to each other. Trespass, and on the same principle trover, proceed on the footing of affirming property in the defendant, and of ratifying the act of the defendant which already has affirmed it. I do not see on what other ground a judgment for the value can be justified. If the title still is in doubt, or remains in the plaintiff, the defendant ought not to be charged for anything but the tortious taking. Again, cannot the plaintiff take the converted chattel on execution? And on what principle can he do so if it does not yet belong to the defendant?

I say but a word as to the practical difficulties of the prevailing rule. No doubt they can be met in one way or another. Suppose the plaintiff after judgment were to retake the chattel by his own act, it would strike me as odd to say that this satisfied the judgment, and as impossible to say that it satisfied the whole judgment, which was for the tort, as well as for the value of the property. Yet on the view which I oppose I presume that the judgment could not be collected. See *Coombe v. Sansom*, 1 Dowl. & Ry. 201.

It seems to me that the opinion which I hold was the prevailing one in England until *Brinsmead v. Harrison*; *Bishop v. Montague*, Cro. Eliz. 824; Fenner, J., in *Brown v. Wootton*, Cro. Jac. 73, 74; s. c. Yelv. 67; Moore, 762; *Adams v. Broughton*, 2 Strange, 1078; s. c. Andrews, 18, 19; *Buckland v. Johnson*, 15 C. B. 145, 157, 162, 163. Serjt. Manning's note to 6 Man. & Gr. 640. See *Lamine v. Dorrell*, 2 Ld. Raym. 1216, 1217. And I should add that I see a relic of the ancient and true doctrine in the otherwise unexplained notion that when execution is satisfied the title of the defendant relates back to the date of the conversion. *Hepburn v. Sewell*, 5 Har. & J. 211; *Smith v. Smith*, 51 N. H. 571, and 50 N. H. 212. Compare *Atoater v. Tupper*, 45 Conn. 144, 147, 148.

The only authorities binding upon us are the ancient evidences of the common law as it was before the Revolution and our own decisions. I have shown what I think was the common law. Our own decisions leave the question open to be decided in accordance with it. *Campbell v. Phelps*, 1 Pick. 62, 65, 70; *Bennett v. Hood*, 1 Allen, 47. Many cases in other States are collected in *Freem. Judgments*, (4th ed.) § 237.

If I am right in my general views, they apply to this case. The plaintiff recovered her judgment in Connecticut, to be sure, as ancillary administrator there, but the horse was there, and she was entitled to it there, so that her judgment recovered there passed the title. Like any other transfer of a chattel valid in the place where it was made and where the chattel was situated, it will be respected elsewhere. The Connecticut law was not put in evidence, and therefore we must presume that a judgment there has whatever effect we attribute to it on the principles of the common law. It is not argued that the defendant stands any worse than Bryden, against whom the judgment was recovered and from whom the defendant's bailor bought the horse.¹

KNOWLTON, J. I am of opinion that the judgment in this case should be for the defendant. It is a general rule of law that when one is entitled to either of two inconsistent remedies for a wrong done him, the pursuit of one of them so far as to affect the interests of the other party is a conclusive election, and a waiver of the other. *Hooker v. Olmstead*, 6 Pick. 481; *Butler v. Hildreth*, 5 Met. 49, 53; *Arnold v. Richmond Iron Works*, 1 Gray, 434, 440; *Connihan v. Thompson*, 111 Mass. 270; *Washburn v. Great Western Ins. Co.*, 114 Mass. 175. *Ormsby v. Dearborn*, 116 Mass. 386; *Seavey v. Potter*, 121 Mass. 297; *Bailey v. Hervey*, 135 Mass. 172, 174; *Goodyear Dental Vulcanite Co. v. Caduc*, 144 Mass. 85, 86; *Raphael v. Reinstein*, 154 Mass. 178. It is under this rule that the owner of property wrongfully taken by another is held to be precluded from claiming it after he has elected to recover the value of it from the wrongdoer. The property passes, not because there has been a sale, but because the owner has elected to receive instead of it that which represents it, and because it would be unjust to permit him to take the property after having chosen the money which is its equivalent. The principal question in cases of this kind is at what stage of the proceedings the owner shall be deemed to have made an election that binds him. On principle, and as a general rule, he should be bound by the election he makes, if in making it he goes so far as to affect the rights or interests of the other party. It would be unjust, when he may proceed only in one or the other of two opposite directions, that he should go forward in one direction in such a way as materially to affect the other party, and then turn backward and go on in the other, and compel his adversary to satisfy him in a different way.

In very early cases it was held that the owner of property unlawfully taken makes a conclusive election of his remedy which passes the property as between the parties when he takes judgment for the value of it against the wrongdoer. He thereby puts his claim for property of which he chooses to say that he has been divested into the form of a debt apparent of record, for the satisfaction of which he may at any time have execution from the court.

¹ See *Rogers v. Moore*, Rice, 60; *Fox v. Northern Liberties*, 3 W. & S. 107; *Barb v. Fish*, 8 Blackf. 481.

But where nothing more is done than to take a judgment without security there are considerations which have led in many courts to a modification of the rule in favor of the owner. Sometimes when he brings his suit in trover he is unable to find the property, and very often his judgment for the value of it cannot be made available. In taking judgment he merely puts in form and settles by adjudication a claim for the value of the property, to which he was entitled from the beginning if he chose to enforce it. He does not otherwise disturb the defendant or his property, and, while it would doubtless be more logical to say that he is concluded by his election as soon as he has recovered judgment, it is perhaps a practical rule which will more generally work out justice to hold that if he does nothing more to collect the money, and if he proceeds within a reasonable time, he may still take the property as his own. But if, having fixed the liability of the defendant for a debt by taking judgment, he says by his conduct that he intends to collect the debt, and does that which affects the interests of the defendant in that particular, he should be deemed to have made his election conclusive.

The cases which say that the rights of the parties in regard to the title are fixed, not by taking judgment, but by obtaining satisfaction, cannot mean that one may take judgment for the full value of the property, and collect one half or two thirds of the amount, and may afterward take and hold the property itself under his original title. Many of these cases were in jurisdictions where attachment on mesne process is not permitted, and where there is no security for a judgment when it is rendered. So far as I am aware, there is no case in which is considered the effect of taking judgment in a suit where there was an attachment which secured the collection of the judgment, or the effect of a partial satisfaction, or of a proceeding after judgment to enforce it by a levy on the property. It seems to me there is good ground for holding that, when one undertakes to collect the value of his property by making an attachment to secure the judgment which he may obtain, and then prosecutes his claim to judgment, he has done that which affects the rights of the other party far more than the mere recovery of a judgment on an unsecured claim. But however that may be, when after judgment the plaintiff proceeds to obtain satisfaction by a levy on the defendant's property, and much more when he levies on the property for the value of which he obtained judgment, and advertises it for sale as the property of the defendant, he should be held to have fixed his rights and the rights of the other party in regard to the title beyond his power to change them. By taking the defendant's property to satisfy the execution he subjects him to the legal costs and expenses attendant upon the levy, and deprives him of what otherwise he would have. Even if he afterwards returns the property, he puts upon him the risk of loss or depreciation in value while it is held. If the property had not been taken on execution, the defendant might have negotiated to obtain the means of satisfying the execution by disposing

of the property, or he might have attempted to satisfy it in some other way. He may have relaxed his efforts, relying on the levy, and if the plaintiff is permitted to abandon the levy and proceed in another way he may ultimately suffer loss on account of what the plaintiff did. This is equally true whether the property is that for which the plaintiff recovered his judgment or not, and if it is the same the plaintiff's act is a distinct and positive assertion that the property is the defendant's by reason of his judgment and of his purpose to collect the judgment and to apply the proceeds of the property in the satisfaction of it. Unless the rule stated at the beginning of this opinion is to be abrogated altogether, it must be held that when a plaintiff has elected to take judgment for the full value of property converted, and has then levied the execution upon property of the defendant which is subject to be taken on execution — especially if it is the property converted — he is thereby precluded from reversing his election and taking the converted property under his original title.

The case of *Ex parte Drake*, 5 Ch. D. 866, cited in the opinion of the majority of the court, was an action of detinue, where by the terms of the judgment the plaintiff was to have either the property or the ascertained value of it.

If the plaintiff cannot abandon her judgment and levy, and reclaim the horse as against Bryden, she cannot as against this defendant, who is in privity with Bryden through Davenport, who is a *bona fide* purchaser from Bryden. So far as the pending proceedings in Connecticut under the levy and the subsequent replevin suit there affect the title, they are binding on the plaintiff here, for the officer was acting in enforcement of her rights by her direction, and she is therefore in privity with him. His relation to her is very different from that of a mere bailee.

The Chief Justice concurs in this opinion.

SECTION II.

GIFTS OF CHATTELS.

NOTE. — The passing of personal property on death, either testate or intestate, is dealt with later under the title of Wills and Administration. The important subjects of Sales and Mortgages are treated in separate courses.

IRONS v. SMALLPIECE.

KING'S BENCH. 1819.

[Reported 3 B. & Ald. 551.]

TROVER for two colts. Plea, not guilty. The defendant was the executrix and residuary legatee of the plaintiff's father, and the plaintiff claimed the colts, under a verbal gift made to him by the testator twelve months before his death. The colts, however, continued to remain in possession of the father until his death. It appeared, further, that about six months before the father's death, the son having been to a neighboring market for the purpose of purchasing hay for the colts, and finding the price of that article very high, mentioned the circumstance to his father; and that the latter agreed to furnish for the colts any hay they might want at a stipulated price, to be paid by the son. None, however, was furnished to them till within three or four days before the testator's death. Upon these facts, Abbott, C. J., was of opinion, that the possession of the colts never having been delivered to the plaintiff, the property therein had not vested in him by the gift; but that it continued in the testator at the time of his death, and consequently that it passed to his executrix under the will; and the plaintiff was therefore nonsuited.

Gurney now moved to set aside this nonsuit. By the gift, the property of the colts passed to the son without any actual delivery. In *Wortes v. Clifton*, Roll. Rep. 61, it is laid down by Coke, C. J., that, by the civil law, a gift of goods is not good without delivery; but, in our law, it is otherwise; and this is recognized in *Shepherd's Touchstone*, tit. Gift, 226. Here, too, from the time of the contract by the father to furnish hay for the colts at the son's expense, the father became a mere bailee, and his possession was the possession of the son; and an action might now be maintained by the defendant, in her character of executrix, upon that contract, for the price of the hay actually provided.

ABBOTT, C. J. I am of opinion, that by the law of England, in order to transfer property by gift there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee. Here the gift is merely verbal, and differs from a *donatio mortis causa* only in this respect, that the latter is subject to a condition,

that if the donor live the thing shall be restored to him. Now, it is a well-established rule of law, that a *donatio mortis causa* does not transfer the property without an actual delivery. The possession must be transferred, in point of fact; and the late case of *Bunn v. Markham*, 2 Marsh. 532, where all the former authorities were considered, is a very strong authority upon that subject. There Sir G. Clifton had written upon the parcels containing the property the names of the parties for whom they were intended, and had requested his natural son to see the property delivered to the donees. It was therefore manifestly his intention that the property should pass to the donees; yet, as there was no actual delivery, the Court of Common Pleas held that it was not a valid gift. I cannot distinguish that case from the present, and therefore think that this property in the colts did not pass to the son by the verbal gift; and I cannot agree that the son can be charged with the hay which was provided for these colts three or four days before the father's death; for I cannot think that that tardy supply can be referred to the contract which was made so many months before.

HOLROYD, J. I am also of the same opinion. In order to change the property by a gift of this description, there must be a change of possession: here there has been no change of possession. If, indeed, it could be made out that the son was chargeable for the hay provided for the colts, then the possession of the father might be considered as the possession of the son. Here, however, no hay is delivered during a long interval from the time of the contract, until within a few days of the father's death; and I cannot think that the hay so delivered is to be considered as delivered in execution of that contract made so long before, and consequently the son is not chargeable for the price of it.

BEST, J. concurred.

ABBOTT, C. J. The *dictum* of Lord Coke in the case cited must be understood to apply to a deed of gift; for a party cannot avoid his own voluntary deed, although he may his own voluntary promise.

Rule refused.

COCHRANE v. MOORE.

QUEEN'S BENCH, 1890.

[Reported 25 Q. B. D. 57.]

FRY, L. J. The judgment I am about to read is that of Lord Justice Bowen and myself.

The question in this interpleader issue arises in respect of a sum of money representing one-fourth of the proceeds of a horse called Kilworth, sold by Messrs. Tattersall. The plaintiff claims the money under a bill of sale executed by one Benzon, comprising this and other

horses. The defendant claims it under an earlier gift of one-fourth of the horse to him by Benzon.

The relevant facts, as they appear in the judgment of Lopes, L. J., and in that part of the evidence to which he attached credence, are shortly as follows:—

The horse was in June, 1888, the property of Benzon, and was kept at the stables of a trainer named Yates, in or near Paris, and on the 8th of that month was ridden in a steeplechase by Moore, a gentleman rider. In consequence, as it appears, of some accident, the horse was not declared the winner, and on the same day, according to the view of the evidence taken by the learned judge, Benzon by words of present gift gave to Moore, and Moore accepted from Benzon, one undivided fourth part of this horse.

A few days subsequently Benzon wrote to Yates, in whose stables the horse was, and told him of the gift to Moore. But he did not inform Moore, nor did Moore know of any communication to Yates of the fact of the gift.

On July 9, 1888, Cochrane advanced 3,000*l.* by way of loan to Benzon, and took from him a promissory note for 3,500*l.*, payable on August 9 following.

On July 16 of the same year, Cochrane advanced to Benzon a further sum of 4,000*l.*, and took a promissory note for 4,800*l.*, payable on September 16.

On July 26 Cochrane advanced to Benzon two sums of money:—One, 1,680*l.* 10*s.* 11*d.* (to be paid to one Sherard, a trainer), and 745*l.*; making together 2,425*l.* 10*s.* 11*d.* And on the same day Benzon executed a bill of sale for 10,000*l.*, under which Cochrane claims. Kilworth and other horses were included in the schedule to this instrument.

It is proved by the evidence of the witnesses, whom the learned judge believed, that, before the execution of the bill of sale, Benzon, with the assistance of a friend, Mr. Powell, was going through the list of horses to be included in the schedule, and that when Kilworth was mentioned Powell spoke of Moore's interest in the horse, and that thereupon a discussion arose as to what was to be done with it, and that Cochrane undertook that it should be "all right." After this the bill of sale was executed by Benzon.

On these facts, it was argued that there was no delivery and receipt of the one-fourth of the horse, and, consequently, that no property in it passed by the gift. The learned judge has, however, held that delivery is not indispensable to the validity of the gift.

The proposition on which the Lord Justice proceeded may perhaps be stated thus: that where a gift of a chattel capable of delivery is made *per verba de presenti* by a donor to a donee, and is assented to by the donee, and that assent is communicated to the donor by the donee, there is a perfect gift, which passes the property without delivery of the chattel itself. This proposition is one of much importance, and has recently been the subject of some diversity of opinion. We there-

fore feel it incumbent upon us to examine it, even though it might be possible in the present case to avoid that examination.

The proposition adopted by the Lord Justice is in direct contradiction to the decision of the Court of King's Bench in the year 1819 in *Irons v. Smallpiece*, 2 B. & A. 551. That case did not proceed upon the character of the words used, or upon the difference between *verba de præsenti* and *verba de futuro*, but upon the necessity of delivery to a gift otherwise sufficient. The case is a very strong one, because a Court consisting of Lord Tenterden, C. J., and Best and Holroyd, J.J., refused a rule *nisi*, and all held delivery to be necessary. The Chief Justice said: "I am of opinion that, by the law of England, in order to transfer property by gift there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee," and he went on to refer to the case of *Bunn v. Markham*, 2 Marsh. 532, as a strong authority.

These observations of the Chief Justice have created some difficulty. What did he mean by an instrument as contrasted with a deed? If he meant that an instrument in writing not under seal was different from parol in respect of a gift *inter vivos*, he was probably in error; but if in speaking of the transfer of property by gift, he included gifts by will, as well as gifts *inter vivos*, then by instrument he meant testamentary instrument, and his language was correct.

Holroyd, J., was equally clear on the principal point: "In order to change the property by a gift of this description" (by which we understand him to mean a gift *inter vivos*) "there must be a change of possession."

The correctness of the proposition thus laid down has been asserted in many subsequent cases of high authority.

Thus in *Reeves v. Copper*, 5 Bing. N. C. 136, the Court of Common Pleas under Tindal, C. J., referred to *Irons v. Smallpiece*, 2 B. & A. 551, and the proposition "that a verbal gift of chattels, unaccompanied with delivery of possession, passes no property to the donee" as being good law and without the expression of any doubt.

In 1849, in the case of *Shower v. Pilck*, 4 Ex. 478, the same question came before the Court of Exchequer, and the Court without hesitation affirmed the ruling of Lord Truro, then Wilde, C. J., at *nisi prius*, and adopted the rule of *Irons v. Smallpiece*, 2 B. & A. 551. The alleged gift in question was *per verba de futuro*, but in respect of chattels then in the possession of the intended donee. The gift was held open to both objections. "To pass the property," said Alderson, B., "there must be both a gift and a delivery: here there is hardly a gift." "There must be a delivery to make the gift valid," said Lord Cranworth, then Rolfe, B., "here there is a mere statement that the goods which the defendant has in her possession the owner will give her."

Again (in 1865), in *Bourne v. Fosbrooke*, 18 C. B. N. S. 515, Erle, C. J., adopted the rule in *Irons v. Smallpiece*, 2 B. & A. 551, as

undoubted law; and in 1870, in *Douglas v. Douglas*, 22 L. T. n. s. 127, the Court of Exchequer declined to consider whether they should overrule that case, and expressed a decided leaning in its favor.

In Ireland, in like manner, the doctrine has been asserted, Lord Plunkett, as Lord Chancellor, holding delivery to be the only admissible evidence of the gift of a personal chattel: *Patterson v. Williams*, L. & G. temp. Plunkett, 95.

We have thus a great body of authority in favor of the necessity of delivery; but, on the other hand, there are several authorities which require consideration.

The first note of dissent was sounded in the year 1841, or twenty-two years after the decision of the case of *Irons v. Smallpiece*, 2 B. & A. 551, by Serjeant Manning in a note on the case of the *London and Brighton Railway Co. v. Fairclough*, 2 Man. & G. 674, at p. 691, in which he impugned the accuracy of *Irons v. Smallpiece*, 2 B. & A. 551, and asserted that after the acceptance of a gift by parol the estate is in the donee without any actual delivery of the chattel. The authorities cited in that note we shall hereafter consider.

In 1845, in *Lunn v. Thornton*, 1 C. B. 379, Maule, J., interlocutorily observed that he had always thought Lord Tenterden's opinion in *Irons v. Smallpiece*, 2 B. & A. 551, very remarkable, because by referring to instruments of gift he left it to be inferred that an assignment might be otherwise than by deed. But beyond this his criticism did not proceed. To the report of this case Serjeant Manning appended a note similar to that in the second volume of Manning and Granger.

Two years afterwards (1847) Lord Wensleydale, in *Ward v. Audland*, 16 M. & W. 862, quoted the passage from Lord Tenterden's judgment already cited, and observed, "that is not correct." To which counsel replied by referring to the criticism of Maule, J., and the learned judge made no further observation. The criticism of the two learned judges was probably directed to the same point, namely, the use of the expression, deed or instrument. Lord Cranworth was present as a Baron of the Exchequer during the argument in *Ward v. Audland*, 16 M. & W. 862, and, as we have seen, two years afterwards unhesitatingly adopted *Irons v. Smallpiece*, 2 B. & A. 551, and that without note or comment — a course which he would hardly have pursued if he knew that Lord Wensleydale considered the case itself bad law.

In 1852, in the case of *Flory v. Denny*, 7 Ex. 581, where the authorities lastly cited were mentioned, Lord Wensleydale referred to the two notes of Serjeant Manning, and read a portion of the latter, but expressed no opinion as to the correctness or incorrectness of the conclusion.

In 1861 the case of *Winter v. Winter*, 4 L. T. n. s. 639, came before the Court of Queen's Bench. In that case a barge belonging to a father had been in the actual possession of his son as his servant. The father gave the barge to the son, and he subsequently, with the father's knowledge and assent, possessed and worked the barge as his own,

and paid the wages of the crew. Wightman, J., upheld the title of the son on the ground of a change in the possession consequent on the gift. Crompton, J., on the ground that actual delivery of the chattel is not necessary to a gift *inter vivos*, and that it was sufficient that the conduct of the parties showed that the ownership had been changed. Lord Blackburn, then Blackburn, J., simply concurred. What, however, is most to our present point, Crompton, J., said, that although *Irons v. Smallpiece*, 2 B. & A. 551, and *Shower v. Pilck*, 4 Ex. 478, had not been overruled, they had been hit hard by the subsequent cases.

In 1883 the case of *Danby v. Tucker*, 31 W. R. 578, came before Pollock, B., sitting as a judge of the Chancery Division, and he declined to follow the decision of *Irons v. Smallpiece*, 2 B. & A. 551, saying that he "certainly could not accede to the proposition generally that the actual delivery of a chattel is necessary to create a good gift *inter vivos*." "The question to be determined," he said, "is not whether there has been an actual handing over of property manually, but whether, looking at all the surrounding circumstances of the case, and looking particularly at the nature and character of the chattel which is proposed to be given, there has or has not been a clear intention expressed on the part of the donor to give, and a clear intention on the part of the recipient to receive, and act upon such gift. Whenever such a case should arise again, I am confident that that would be the basis of the decision of a Court of Common Law, and, of course, the same result would follow in a Court of Equity.

Lastly (in 1885), Cave, J., in the case of *In re Ridgway*, 15 Q. B. D. 447, expressed his opinion "that it is going too far to say that the retention of possession by the donor is conclusive proof that there is no immediate present gift; although, undoubtedly, unless explained or its effect destroyed by other circumstances, it is strong evidence against the existence of such an intention."

These two latter authorities have been followed by Lopes, L. J., in the case now before us, feeling that when sitting as a judge of the first instance he could not rightly depart from them.

There is thus some difference of judicial opinion as to the rule stated in *Irons v. Smallpiece*, 2 B. & A. 551. We cannot think that the few recent decisions to which we have referred are enough to overrule the authority of that decision, and the cases which have followed it, but they make it desirable to inquire whether the law as declared before 1819 was in accordance with that decision, or with the judgment of Pollock, B., in *Danby v. Tucker*, 31 W. R. 578.

This inquiry into the old law on the point is one of some difficulty, for it leads into rarely-trodden paths, where (as is very natural) we have not had the assistance of counsel, and where the materials for knowledge are for the most part undigested.

The law enunciated by Bracton in his book "*de acquirendo rerum dominio*," seems clear to the effect that no gift was complete without

tradition of the subject of the gift. "Item oportet," he says (vol. i., p. 128), "quod donationem sequatur rei traditio, etiam in vita donatoris et donatorii; alioquin dicitur talis donatio potius nuda promissio quam donatio, et ex nuda promissione non nascitur actio, non magis quam ex nudo pacto, non enim valet donatio imperfecta, nec chartæ confectio, nec homagii captio cum omni solemnitate adhibita, nisi subsequuta fuerit seysina et traditio in vita donatoris." And again (p. 300): "Item non sufficit chartam esse factam & signatam nisi probetur donationem esse perfectam, & quod omnia, quæ donationem faciunt, ritè præcesserunt, & subsequutam esse traditionem, alioqui nunquam transferri potest res donata ad donatorium. Poterit enim homagium præcessisse, & quòd charta ritè facta sit, & vera & bona & cum solemnitate recitata & audita, tamen nunquam valebit donatio nisi tunc demum cum fuerit traditio subsequuta, & sic poterit charta essa vera, sed sine facta seysina, nuda." And to the same effect is another passage in chapter xviii., p. 310.¹

In Bracton's day, seisin was a most important element of the law of property in general; and, however strange it may sound to jurists of our day and country, the lawyers of that day applied the term as freely to a pig's ham (*Select Pleas in Manorial Courts*, p. 142;² see also Professor Maitland's papers on the Seizin of Chattels, the Beatitude of Seizin, and the Mystery of Seizin: *Law Quarterly Rev.*, i., 324; ii., 484; iv., 24, 266) as to a manor or a field. At that time the distinction between real and personal property had not yet grown up: the distinction then recognized was between things corporeal, and things incorporeal: no action could then be maintained on a contract for the sale of goods, even for valuable consideration, unless under seal: the distinction so familiar to us now between contracts and gifts had not fully developed itself. The law recognized seisin as the common incident of all property in corporeal things, and tradition or the delivery of that seisin from one man to another as essential to the transfer of the property in that thing, whether it were land or a horse, and whether by way of sale or of gift, and whether by word of mouth or by deed under seal. This necessity for delivery of seisin has disappeared from a large part of the transactions known to our law; but it has survived in the case of feoffments. Has it also survived in the case of gifts?

It has been suggested that Bracton, whilst purporting to enunciate the law of England, is really copying the law of Rome. But by the law of Rome, at least since the time of Justinian, gift had been a purely consensual transaction, and did not require delivery to make it perfect (*Inst.* ii., vii.).

Coming next to the great law-writers of the reign of Edward I., they hold language substantially the same as that of Bracton, except indeed

¹ "Item non valet donatio, nisi subsequatur traditio, quia non transfertur per homagium res data, nec per chartarum vel instrumentorum confectionem, quamvis in publico fuerint recitata."

² Published by the Selden Society.

that the difference between transactions purely voluntary, or for pecuniary consideration, appears to be growing somewhat more important. "Donatio," says Fleta, "*est quædam institutio, quæ ex mera liberalitate, nullo jure cogente, procedit, ut rem a vero ejus possessore ad alium transferatur. Dare autem est rem accipientis facere cum effectu, alioquin inutilis erit donatio, cum irritari valeat et revocari*" (Lib. iii., c. 3). He then proceeds to discuss various kinds of gifts, and says: "*Alia perfecta, et alia incepta et non perfecta: ut si donatio lecta fuerit et concessa, et homagium captum, ac traditio nondum fuerit subsecuta*" (loc. cit.; see also Lib. iii., c. 15).

In Lib. iii., c. 7, he discusses the necessary elements of donations, and, amongst other things, the effect of duress on a gift; and here the necessity of delivery is again clearly shown, because, according to Fleta, a promise made without duress followed by delivery under duress is not a valid gift. "Refert tamen," he says, "*utrum metus præveniat donationem vel subsequatur, quia si primo coactus, et per metum compulsus promisero, et postea gratis tradidero, talis metus non excusat; sed si gratis promisero et compulsus tradidero tunc excusat metus.*"

Britton held substantially the same language. In citing him we shall prefer the translation of Mr. Nichols to the Norman-French of the original. In his chapter on Gifts (Lib. ii., c. 3), he gives a very clear description of the nature of a gift. "A gift," he says, "is an act whereby anything is voluntarily transferred from the true possessor to another person, with the full intention that the thing shall not return to the donor, and with full intention on the part of the receiver to retain the thing entirely as his own without restoring it to the giver. For the gift cannot be properly made, if the thing given does not so belong to the receiver, that the two rights, of property and of possession, are united in his person, so that the gift cannot be revoked by the donor, or made void by another, in whom the lawful property is vested" (pp. 220, 221).

And again (Lib. ii., c. 3):—

"Some gifts are complete, where both rights unite in the purchaser; others are begun, but not completed; and such titles are bad, as in case of gifts granted, whereof no livery of seisin follows" (pp. 225–6).

Passages of similar import will be found in Lib. i., c. 29, and Lib. ii., c. 8.

The third writer of the age of Edward I. is one of a very different character from Fleta and Britton—we mean Horn, the author of the *Mirror of Justices*; he attacked the judges and the administration of the law in his days with a vehemence which it is to be hoped was undeserved. But though amongst the 155 abusions or abuses of the law which stirred his soul to wrath, some relate to seisin, yet he has nothing to say at variance with his contemporaries on the necessity of delivery; but, on the contrary, expressly affirms that "the law requires but three things in contracts: 1. The agreement of the wills; 2. Satisfaction

of the donor ; 3. Delivery of the possession and gift " (Chap. v., sect. 1, para. 75).

In the reign of Edward IV. a step seems to have been taken in the law relative to gifts which resulted in this modification : that whereas under the old law a gift of chattels by deed was not good without the delivery of the chattel given, it was now held that the gift by deed was good and operative until dissented from by the donee.

Thus in Michaelmas Term, 7 Edw. 4, pl. 21, fol. 20, it was held by Choke and other justices that if a man executes a deed of gift of his goods to me that this is good and effectual without livery made to me, until I disagree to the gift, and this ought to be in a Court of Record.

In Hilary Term, 7 Edw. 4, pl. 14, fol. 29, it was alleged by counsel (Catesby and Pigot), that if a man give to me all his goods by a deed, although the deed was not delivered to the donee, nevertheless the gift is good, and if he chooses to take the goods he can justify this by the gift, although notice has not been given to him of the gift; and further, that if the donee commit felony before notice, &c., still the king will have the goods, and although notice may be material, nevertheless when he has notice, this would have relation to the time of the gift, &c. But the Court said that such a gift is not good without notice, for a man cannot give his goods to me against my will.

An earlier case in the same reign has been cited as bearing on the present question. In Michaelmas Term, 2 Edw. 4, pl. 26, fol. 25, a case arose on trespass of goods, in which Laicon was counsel for the defendant, and the Court was engaged in considering the sufficiency of his pleas. In the course of this discussion Laicon put this question, "Suppose I give to you my goods, which are at Everwike, and before that you are seized of them, a stranger takes them away, have you not a writ of trespass against the stranger?" Which he then proceeds to answer. "Yes, Sir, for by the gift at once the property was in you and the possession by the writ is adjudged in you presently." Danby, the Chief Justice of the Common Pleas, seems to have assented, apparently on the ground that pleading to such a writ by way of justification would confess the possession of the plaintiff and the taking by the defendant (*car la si vous pled. vr. matter accord, et justif, et vous confess. prisel hors de son poss.*). But immediately after this discussion Laicon found his argument so hopeless (*videns opinionem curiæ contra eum*) that he seems to have amended his pleadings.

This case seems to us of no authority on the point under investigation. What was said was not in discussion of what really passed by the gift, but only of the effect of pleading in preventing the denial of the plaintiff's possession. The question seems to relate to an effectual gift of goods without possession, but there is nothing to show whether the parties to the discussion had in contemplation a gift by deed or not. The cases already referred to which occurred a few years later seem to show that the effect of a deed in passing the property with-

out delivery of the chattel was claiming the attention of the lawyers of that day.

Brooke, in his Abridgment (Trespass, 303), cites this case of the 2 Edw. 4, and seems to put it upon a somewhat different ground to the Year Book itself. He says that Danby agreed in Laicon's argument, "for by the gift the property is in him, and then the law adjudges possession, which was not denied, and it seems to be the law, because goods are transitory whilst land is local." We can find no authority for these reasons in the entry which he professes to be abstracting.

This case, as explained by Brooke, seems to underlie the proposition asserted twice in the case of *Hudson v. Hudson*, Latch, 214, 263, discussed in 2 Wms. Saunders 47 a, to illustrate the right of an executor to sue in trover before actual possession. If, it was said, a man in London gives to me his goods in York and another take them I can bring trespass; for property, it was added, draws possession in chattels personal. The Court were not considering what gift of chattels did carry the property, but only illustrating the proposition that where the property has passed, as by the will to the executor, there the law attracts to it possession. This would be perfectly illustrated by the case of chattels in York transferred by deed executed in London. The whole supposition that this case lends any countenance to the notion that chattels can pass without delivery seems to be derived from the silence of the case as to the way in which the gift was made: and this point was not material to the matter under consideration by the Court. Moreover, where a legal result could only be produced by a deed, our elder law-writers were, we believe, less apt to mention the deed than their less technical descendants.

One other case in the reign of Edward IV. must be mentioned. In Michaelmas Term, 21 Edw. 4, pl. 27, fol. 55, it was said by Brian, J., that in detinue of chattels it was a good plea to say that the plaintiff after the bailment gave them to the defendant and then he could have his law — *quod fuit concessum*. The case appears to go only to this, that if A. after bailing a chattel to B. then gives it to B., B. might defend himself by his suit in an action of detinue. If good law, it seems to establish that delivery first and gift afterwards is as effectual as a gift first and delivery afterwards.

One case in the reign of Henry VII. perhaps requires consideration (Hilary Term, 21 Hen. 7, pl. 30, fol. 18). The question seems to have been whether the use of land was presently transferred by a bargain and sale, and in the course of the report the following passage occurs: "If I give to a man my cow or my horse, he may take the one or the other at his election: and the cause is that immediately by the gift the property is in him, and that of the one or the other at his will; but if the case were that I will give to him a horse or a cow in future time, then he cannot take either the one or the other, for then it is in my election to choose which of them I will give him." The case is interesting as the first one which we have found which empha-

sizes the distinction in gifts between words in the present and in the future tense. But the passage we have cited appears to have no real weight of authority. It is only part of the argument of the Attorney-General, and the argument does not appear tenable; for surely it is open to question whether the gift, even a grant for valuable consideration, of one or other of two things at the election of the donee or grantee can pass the property in one or other or both of these things immediately and before the election of the grantee. It is further to be observed that the question before the Court turned on the doctrine of election; and whether the supposed gift was to be by deed or not is a point on which the report is silent. This silence is the only reason why the passage has been thought by some persons relevant to the present inquiry.

It was in the reigns of the early Tudors that the action on the case on *indebitatus assumpsit* obtained a firm foothold in our law; and the effect of it seems to have been to give a greatly increased importance to merely consensual contracts. It was probably a natural result of this that, in time, the question whether and when property passed by the contract came to depend, in cases in which there was a value consideration, upon the mind and consent of the parties, and that it was thus gradually established that in the case of bargain and sale of personal chattels, the property passed according to that mind and intention, and a new exception was thus made to the necessity of delivery.

This doctrine that property may pass by contract before delivery appears to be comparatively modern. It may, as has been suggested, owe its origin to a doctrine of the civil law that the property was at the risk of the purchaser before it passed from the vendor; but at any rate the point was thought open to argument as late as Elizabeth's reign (see Plowd. 11 b, and see a learned note, 2 Man. & Ry. 566).

Flower's Case, Noy, 67 (which seems to have been decided in 39 Elizabeth (see p. 59)), appears to show that the necessity of delivery was then upheld by the Court. The case is thus stated by Noy (p. 67):—

“A. borrowed one hundred pound of B. and at the day brought it in a bagg and cast it upon the table before B. and B. said to A. being his nephew, I will not have it, take it you and carry it home again with you. And by the Court, that is a good gift by paroll, being cast upon the table. For then it was in the possession of B. and A. might well wage his law. By the Court, otherwise it had been, if A. had only offer'd it to B. for then it was chose in action only, and could not be given without a writing.”

The Court seems to have held that delivery was necessary, but that by the casting of the money on the table it came into the possession of the uncle, and that the nephew taking the money in his uncle's presence and by his direction, there was an actual delivery by the uncle to the nephew—so that the nephew might wage his law, i. e., might conscientiously swear that he was not indebted to his uncle (see the case discussed in *Douglas v. Douglas*, 22 L. T. N. S. 127).

In Jenkins's Centuries (3d Century, Case ix.), it is said: "A gift of anything without a consideration is good: but it is revocable before the delivery to the donee of the thing given. Donatio perfectur possessione accipientis. This is one of the rules of law": — a statement made with little reference to the other matters treated of in the case.¹ We know of no other authority exactly to the same effect as this, nor is it stated as having the authority of any judicial decision.

Blackstone's discussion of the subject of gifts of chattels is perhaps not so precise as might be desired; but his language does not seem to us essentially to differ from the earlier authorities: "A true and proper gift or grant is," he says, "always accompanied with delivery of possession and takes effect immediately." "But if the gift does not take effect by delivery of immediate possession, it is then not properly a gift, but a contract: and this a man cannot be compelled to perform (Book 2, c. 30).

In 1818 the year before *Irons v. Smallpiece*, 2 B. & A. 551, was decided, the then Master of the Rolls, Sir Thomas Plumer, in *Hooper v. Goodwin*, 1 Sw. 485, 491, said: "A gift at law or in equity supposes some act to pass the property: in donations *inter vivos* . . . if the subject is capable of delivery, delivery."

These are, so far as we can find, all the relevant authorities before the decision in *Irons v. Smallpiece*, 2 B. & A. 551, though they are not all the authorities that have been cited as relevant. But several that have been relied upon appear to us to have no real bearing on the point at issue. Thus in *Wortes v. Clifton*, Roll. 61; Mich. 12 James 1, Coke *arguendo* uses as an illustration of the difference between the Civil law and ours — that in the Civil law a gift is not good without tradition — but that it is otherwise in our law. Here, for aught that appears, the gift which the learned counsel referred to as good without delivery is a gift by deed.

In like manner several authorities which affirm that a gift of chattels may be good without deed and are silent as to delivery (Perkins' Profitable Book, Grant, 57; 2 Shep. Touchs. 227; Comyn Digt. Biens D. 2) have been cited as if they likewise asserted that a gift was good without delivery — a proposition which they do not affirm, or, as we think, imply.

This review of the authorities² leads us to conclude that according to

¹ "This reasoning I have gone upon is agreeable to Jenk. Cent. 109, case 9, relating to delivery to effectuate gifts. How Jenkins applied that rule of law he mentions there, I know not; but rather apprehend he applied it to a donation *mortis causa*; for if to donation *inter vivos*, I doubt he went too far." Per LORD HARDWICKE, C., in *Ward v. Turner*, 2 Ves. Sen. 431, 442.

² "It has, indeed, been held that a gift is not binding unless it be by deed, or the subject of the gift be actually delivered; but if the point were *res nova*, it would perhaps be decided differently. Per PARKE, B., in *Oulds v. Harrison*, 10 Exch. 572, 575.

"My brother Manning in a learned note to the case of *The London and Brighton Railway Company v. Fairclough*, comments upon that decision [*Irons v. Smallpiece*]

the old law no gift or grant of a chattel was effectual to pass it whether by parol or by deed, and whether with or without consideration unless accompanied by delivery: that on that law two exceptions have been granted, one in the case of deeds,¹ and the other in that of contracts of sale where the intention of the parties is that the property shall pass before delivery: but that as regards gifts by parol, the old law was in force when *Irons v. Smallpiece*, 2 B. & A. 551, was decided: that that case therefore correctly declared the existing law: and that it has not been overruled by the decision of Pollock, B., in 1883, or the subsequent case before Cave, J.

We are therefore unable in the present case to accept the law on this point as enunciated by Lopes, L. J., in deference to the two latest decisions.

But assuming delivery to be necessary in the case of the gift of an ordinary chattel, two questions would remain for consideration in the present case — the first, whether the undivided fourth part of the horse admits of delivery, or whether on the other hand it is to be regarded as incorporeal and incapable of tradition; the other, whether the letter written by Benzon to Yates was either a constructive delivery of this undivided fourth part of the horse, or an act perfecting the gift of this incorporeal part so far as the nature of the subject-matter of the gift admits.² On these points we do not think it needful to express any decided opinion, because in our judgment what took place between Benzon and Cochrane before Benzon executed the bill of sale to Cochrane, constituted the latter a trustee for Moore of one-fourth of the horse Kilworth.

Another objection to Cochrane's title was based on the bill of sale, which bore date July 26, 1888, and stated the consideration as a sum of 7,575*l.* then owing by Benzon to Cochrane, and of the further sum of 2,425*l.*, then paid by Cochrane to Benzon, making together a sum of 10,000*l.*; whereas in fact at the date of the bill of sale Benzone was only indebted to Cochrane on two promissory notes then current and payable respectively in August and September, and for sums amounting together to 8,300*l.* It is said that by an agreement arrived at at the time, this 8,300*l.* due *in futuro* was to be taken as between the parties as represented by the sum of 7,575*l.*; but if so, this agreement should in our opinion have been stated in the bill of sale, and we are therefore of opinion that the document was void as not truly stating the consideration for which it was given.

For these reasons we are of opinion that this appeal should be dismissed with costs.

LORD ESHER, M. R. In my opinion, it always was the law of Eng-

suggesting that sufficient weight was not given to the fact of acceptance by the donee of the gift. He certainly cites authorities of weight upon the subject." Per WILLIAMS, J., in *Martin v. Reid*, 31 L. J. N. S. C. P. 126, 127.

¹ See *McWillie v. Van Vacter*, 35 Miss. 428. — Ed.

² See *Green v. Langdon*, 28 Mich. 221. — Ed.

land that an owner of a chattel could transfer his ownership thereof to another person by way of exchange or barter, or by way of bargain and sale for a consideration, or by way of and as a mere gift, or by will. Once conclude that such was always the law, and it follows that it is the common law. That law could not and cannot be altered by mere judicial decision, but only by Act of Parliament. The authority of any judicial decision to the contrary would be overruled at any time, however remote, by a competent Court. But each of the above propositions is a fundamental proposition of law, i. e., a proposition which is not evidence of some other proposition which has to be proved, but a proposition the existence of which — i. e., the facts necessary to constitute which — is to be proved by evidence. The moment those facts are proved the proposition of law is proved, to which the legal tribunal will give effect. Although no Court can properly alter such a fundamental proposition, the amount or nature of the evidence which will satisfy a Court of the existence of such a proposition, as applicable to a particular case, may vary, and has varied, at different epochs. I have no doubt that in every one of the propositions above enumerated, unless it be in the case of a gift by will, there was a time when, as part of the evidence of the existence of the proposition in a particular case, the Courts always required that there should have been an actual delivery of the chattel in question. Though there was proof of a contract for good consideration, in a form which would now pass the property in a chattel without delivery, proof of actual delivery was required. Though the transfer was contained in a deed, proof of actual delivery was required. Equally the statement that one had declared in mere writing or in words that he did then, at the moment, transfer, without consideration, his chattel to another, and that the other did at the same moment state in writing or in words that he accepted such transfer, was not acted upon by the Courts as proof of a gift executed, without proof also of an actual delivery. The evidence required in all cases was not complete without proof of an actual delivery. But in some of the cases the Courts undoubtedly do not now require proof of an actual delivery. They do not require that piece of evidence. They do not in the case of a transfer by deed, or in the case of a transfer by a contract for good consideration, showing in its terms an intention that the ownership should pass at once before or without immediate delivery. If I thought that there was not a difference between those cases and the case of what has been called a gift in words by the donor, and an acceptance in words by the donee of a chattel, I should be strongly inclined to think that, even though the Courts would have required in such case proof of an actual delivery, up to and including the case of *Irons v. Smallpiece*, 2 B. & A. 551, the Courts might now in such case, as former Courts did in the other cases, be satisfied by other evidence of the gift by the one and the acceptance of the gift by the other, which are the facts which constitute the proposition of a transfer of ownership of a chattel by way of and as a gift.

Up to the time of *Irons v. Smallpiece*, 2 B. & A. 551, and afterwards, I have no doubt the Courts did require proof of an actual delivery in such a case. Upon long consideration, I have come to the conclusion that actual delivery in the case of a "gift" is more than evidence of the existence of the proposition of law which constitutes a gift, and I have come to the conclusion that it is a part of the proposition itself. It is one of the facts which constitute the proposition that a gift has been made. It is not a piece of evidence to prove the existence of the proposition; it is a necessary part of the proposition, and, as such, is one of the facts to be proved by evidence. The proposition is not — that the one party has agreed or promised to give, and that the other party has agreed or promised to accept. In that case, it is not doubted but that the ownership is not changed until a subsequent actual delivery. The proposition before the Court on a question of gift or not is — that the one gave and the other accepted. The transaction described in the proposition is a transaction begun and completed at once. It is a transaction consisting of two contemporaneous acts, which at once complete the transaction, so that there is nothing more to be done by either party. The act done by the one is that he gives; the act done by the other is that he accepts. These contemporaneous acts being done, neither party has anything more to do. The one cannot give, according to the ordinary meaning of the word, without giving; the other cannot accept then and there such a giving without then and there receiving the thing given. After these two things done, the donor could not get possession of the chattel without bringing an action to force the donee to give it back. Short of these things being done, the donee could not get possession without bringing an action against the donor to force him to give him the thing. But if we are to force him to give, it cannot be said that he has given. Suppose the proposing donor offers the thing saying, "I give you this thing — take it"; and the other says, "No, I will not take it now; I will take it to-morrow." I think the proposing donor could not in the meantime say correctly to a third person, "I gave this just now to my son or my friend." The answer of the third person would (I think rightly) be: "You cannot say you gave it him just now; you have it now in your hand." All you can say is: "That you are going to give it him to-morrow, if then he will take it." I have come to the conclusion that in ordinary English language, and in legal effect, there cannot be a "gift" without a giving and taking. The giving and taking are the two contemporaneous reciprocal acts which constitute a "gift." They are a necessary part of the proposition that there has been a "gift." They are not evidence to prove that there has been a gift, but facts to be proved to constitute the proposition that there has been a gift. That being so, the necessity of their existence cannot be altered unless by Act of Parliament. For these reasons, I think that the decision in *Irons v. Smallpiece*, 2 B. & A. 551, cannot be departed from, and I cannot agree with the decisions, which have been cited to us, of Pollock, B., and Cave, J.

I think, therefore, that we cannot agree with the main reason given by Lopes, L. J., for his decision in the present case, which he gave because he thought that, sitting as a judge of the Queen's Bench Division, he ought to follow the later decisions. His own opinion was in favor of maintaining *Irons v. Smallpiece*, 2 B. & A. 551. But I do entirely agree with what I understand was another ground on which he was prepared to decide this case, and which he found, as a fact, existed in this case, namely, that the deed on which the claimant's case rested was obtained by a fraudulent misrepresentation, and was repudiated by the giver of it as soon as he discovered the fraud.

For this reason, and the others mentioned by my brother Fry, I think the appeal must be dismissed. I wish to say that I am not prepared to differ in any respect from the judgment of my learned brothers; but I wish to add my own particular reason.

*Appeal dismissed.*¹

NOTE.—INCORPOREAL PERSONAL PROPERTY. COMMON LAW. Any incorporeal personal property, such as a debt, is commonly called a *chose in action*, though the term was originally, and now often is, used in a narrower sense. For the various meanings of *chose in action* and the things held to have been included in the term, see Warren, *Choses in Action*, 1-26.

Incorporeal personal property is not transferable at common law. For the reasons given for this, see Warren, 31, 32.

Annuities were, however, assignable, even under the ancient law. See *Baker v. Brook*, Dyer, 65 a; *Mary York v. Twine*, Cro. Jac. 78; Co. Lit. 144 b, Hargrave's note; *Gerrard v. Boden*, Hetl. 80; Macleod, *Banking* (5th ed.), 219.

And as to many kinds of obligations, if the King assigned them, his assignee could sue in his own name, and if they were assigned to the King, the King could sue in his own name. Warren, 34 *et seq.*; *Miles v. Williams*, 1 P. Wms. 249, 252. And it seems that this prerogative exists in the government of the United States. *U. S. v. Buford*, 3 Pet. 12, 30; *U. S. v. White*, 2 Hill, 59, 63.

At more or less recent dates various important kinds of incorporeal personal property have been made assignable either by statutes or by decisions of the courts without the aid of statute. Among these are Bills of Exchange and Promissory Notes, Shares in the Stock of Corporations, Patent Rights and Copyrights. Of late years, in many jurisdictions, incorporeal personal property generally has been made transferable. Warren, 119 (before the Judicature Act), 140 (after that Act); 1 Stimson, *Am. Stat. Law*, §§ 4031-4038.

The law as to the assignability or non-assignability of incorporeal personal rights is generally treated together with the law governing the creation of those rights. Thus, treatises and lectures on Bills and Notes commonly discuss not only the making but the transfer of the rights created by those instruments.

The passing of incorporeal personal property on the death or on the bankruptcy and insolvency of the owner is dealt with under Wills and Administration and under Bankruptcy, respectively.

EQUITY. Legal rights in incorporeal personal property have always been assignable in equity, either by compelling the assignee to sue at law in the assignor's

¹ See *Winter v. Winter*, 4 L. T. N. S. 639, and *Wing v. Merchant*, 57 Me. 383 (cf. *Kilpin v. Ratley*, [1892] 1 Q. B. 582); *Poullain v. Poullain*, 79 Ga. 11, 19; *Miller v. Le Piere*, 136 Mass. 20; *Doering v. Kenamore*, 86 Mo. 588; *Picot v. Sanderson*, 1 Dev. 309 (but cf. *Bromley v. Brunton*, L. R. 6 Eq. 275); *Hillebrant v. Brewer*, 6 Tex. 45.—ED.

name or by other appropriate methods; and so rights which are exclusively equitable are assignable in equity. Warren, 46 *et seq.*

TRANSFERS AGAINST PUBLIC POLICY. Some rights, however, cannot be assigned either at law or in equity. Public policy forbids their transfer. Chief among these are: Future salaries of public officers. *Barwick v. Reade*, 1 H. Bl. 627. *Flarty v. Odum*, 3 T. R. 681. *Lidderdale v. Montrose*, 4 T. R. 248. *Palmer v. Bate*, 2 Brod. & B. 673. *Cooper v. Reilly*, 2 Sim. 560. *Wells v. Foster*, 8 M. & W. 149. *Schloss v. Hewlett*, 81 Ala. 266. *Bangs v. Dunn*, 66 Cal. 72. *Field v. Chipley*, 79 Ky. 260. *Roeller v. Ames*, 33 Minn. 132. *State v. Williamson*, 118 Mo. 146. *Shwenk v. Wyckoff*, 46 N. J. Eq. 560. *Bliss v. Lawrence*, 68 N. Y. 442. *Bowery Nat. Bank v. Wilson*, 122 N. Y. 478. *Nat. Bank of El Paso v. Fink*, 86 Tex. 303. *Shannon v. Bruner*, 36 Fed. R. 147. *Contra, State v. Hastings*, 15 Wis. 75; but this case has been disapproved in many of the last-mentioned authorities. In the leading case of *Bliss v. Lawrence*, *supra*, it is said that the question of public policy was not considered in *Brckett v. Blake*, 7 Met. 335, and *Mulhall v. Quinn*, 1 Gray, 105.

In *Flarty v. Odum*, *supra*, BULLER, J., intimated that the pay of a public officer, actually due, might be assigned. But in *Sandwich Mfg. Co. v. Krake*, 66 Minn. 110, it was held that the wages of a fireman, although due, could not be reached by proceedings supplementary to execution. *Sed qu.*

When, however, the service is not a public one, the compensation may be assigned. *Grenfell v. Dean and Canons of Windsor*, 2 Beav. 544. *In re Mirams*, [1891] 1 Q. B. 594. *Contra, Matter of Worthington*, 141 N. Y. 9, where it was held that an executor cannot assign his commissions in advance of their adjustment and payment.

PENSIONS. In *Wells v. Foster*, *supra*, BARON PARKE drew a distinction between a pension given entirely as a compensation for past services, and one not exclusively for past services, but as a consideration for some continuing duty or service; the former may be assigned, the latter not. This distinction has been generally followed. *Arbuthnot v. Norton*, 5 Moo. P. C. 219. *Spooner v. Payne*, 1 De G., M. & G. 383. *Dent v. Dent*, L. R. 1 P. & D. 386. *Wilcock v. Terrell*, 3 Ex. Div. 323. *Lucas v. Harris*, 18 Q. B. D. 127, 135. See the remarks of LORD LANGDALE, M. R., in *Grenfell v. Dean and Canons of Windsor*, *supra*, on *Davis v. Marlborough*, 1 Swanst. 79.

By statute, assignments of pensions are prohibited, and pensions are exempted from seizure by legal process. U. S. R. S. §§ 4745, 4747; 47 G. III. sess. 2, c. 25; 44 & 45 Vict. c. 58, § 141. Such provisions protect the pension only while it is in transit to, and not after it has reached, the pensioner. See *Rozelle v. Rhodes*, 116 Pa. 129; *Crowe v. Price*, 22 Q. B. D. 429. State statutes sometimes exempt from seizure not only pensions, but the property in which they are invested. *Diamond v. Palmer*, 79 Iowa, 578.

U. S. R. S. § 3477 makes null all transfers of claims upon the United States. In *U. S. v. Gillis*, 95 U. S. 407, it was said that the language of this section was broad enough to cover claims of every kind. In *Erwin v. U. S.*, 97 U. S. 392, it was said this law applies only to voluntary assignments, and not to the passing of claims to heirs, devisees, or assignees in bankruptcy. Nor does it apply to a voluntary assignment of all property by an insolvent for the benefit of his creditors. *Goodman v. Niblack*, 102 U. S. 556. See also *Forrest v. Price*, 52 N. J. Eq. 16, 27.

ALIMONY. In *Re Robinson*, 27 Ch. D. 160, the Court of Appeal was inclined to think that alimony was not alienable. And see remarks of CAVE, J., in *Linton v. Linton*, 15 Q. B. D. 239, 241.

FELLOWSHIP. The income of a fellowship is assignable in equity. *Feistel v. King's College, Cambridge*, 10 Beav. 491. In *Bank v. Morrow*, 99 Tenn. 527, it was held that the right to nominate a scholar to be supported and taught at the expense of a college is not such property as may be taken and sold for debts.

CLAIMS FOR TORTS. Claim for a tort to the person is not assignable before judgment, not even after verdict. *Rice v. Stone*, 1 Allen, 566. *People v. Tioga Common Pleas*, 19 Wend. 73.

In *People v. Tioga Common Pleas*, *ubi supra*, it was suggested that although an attempted assignment of a claim for a tort to the person was void as an assignment, it was good as a contract, and would give a right of action for damages against the

assignor if he afterwards released the claim to the wrongdoer. But see 2 L. C. Eq. (4th Am. ed.) 1627, 1628. See *Williams v. Ingersoll*, 89 N. Y. 508.

In many jurisdictions the subject is affected by statute.

The rule is sometimes stated more broadly, prohibiting the assignment of any claim in tort. *Gardner v. Adams*, 12 Wend. 296.

But in general claims for injuries to property may be assigned. *Comegys v. Vasse*, 1 Pet. 193, 213. *Chicago, &c. R. R. Co. v. Wolcott*, 141 Ind. 267. *North v. Turner*, 9 S. & R. 244.

In England a distinction has been drawn between the assignment of a bare right to bring a bill in equity to set aside a transaction for fraud, *Prosser v. Edmonds*, 1 Y. & C. Ex. 481 (see *Hill v. Boyle*, L. R. 4 Eq. 260), and a transfer of the interest of the defrauded party in property which carries the incidental right to sue. *Dickinson v. Burrell*, L. R. 1 Eq. 337. *Prosser v. Edmonds* was approved in *Marshall v. Means*, 12 Ga. 61; *Norton v. Tuttle*, 60 Ill. 130; *Morrison v. Deaderick*, 10 Humph. 342; *Milwaukee, &c. R. R. Co. v. Milwaukee, &c. R. R. Co.*, 20 Wis. 174; and accord. are *Sanborn v. Doe*, 92 Cal. 152; *Brush v. Sweet*, 38 Mich. 574. But see *Clews v. Traer*, 57 Iowa, 459. In *Smith v. Thompson*, 94 Mich. 381, it was held that the right to bring an action on the case for fraud was not assignable.

It is often said that the test of assignability is whether or not the claim is one which will survive to the legal representative of the injured party on his death (post, Vol. IV. Bk. VII.); e. g. in *Comegys v. Vasse*, *ubi sup.* *Grant v. Ludlow*, 8 Ohio St. 1, 37. *North Chicago, &c. R. R. Co. v. Ackley*, 171 Ill. 100, 105, 115. *Chicago, &c. R. R. Co. v. Wolcott*, *ubi sup.* *Final v. Backus*, 18 Mich. 218.

CHAPTER IV.

POSSESSION.

NOTE. — The authorities collected thus far have been intended to illustrate the acquisition and transfer of ownership. In this chapter the rights which may be had in personal property by persons other than the owner are dealt with.

SECTION I.

BAILMENT.

A. *Nature and Acquisition of Lien.*

CHAPMAN *v.* ALLEN.

KING'S BENCH. 1632.

[*Reported Cro. Car.* 271.]

ACTION of trover of five kine. Upon not guilty pleaded, a special verdict was found, that one Belgrave was possessed of those five kine, and put them to pasturage with the defendant, and agreed to pay to him twelve pence for every cow weekly as long as they remained with him at pasture; and that afterwards Belgrave sold them to the plaintiff, and he required them of the defendant, who refused to deliver them to the plaintiff, unless he would pay for the pasturage of them for the time that they had been with him, which amounted to ten pounds: afterwards one Foster paying him the said ten pounds by the appointment of Belgrave, he delivered the five beasts to Foster; and if *super totam materiam* he be guilty, they find for the plaintiff, and damages twenty-five pounds; and if, &c. then for the defendant.

JONES, Justice, and myself (*absentibus cæteris justiciariorum*), conceived, that this denial upon demand, and delivery of them to Foster, was a conversion, and that he may not detain the cattle against him who bought them until the ten pounds be paid, but is inforced to have his action against him who put them to pasturage. And it is not like to the cases of an innkeeper or taylor; they may retain the horse or garment delivered them until they be satisfied, 1 Com. Dig. 211, but not when one receives horses or kine or other cattle to pasturage, paying for them a weekly sum, unless there be such an agreement betwixt them. Whereupon rule was given, that judgment should be entered for the plaintiff.

KRUGER v. WILCOX.

CHANCERY. 1755.

[*Reported Ambl.* 252.]

THIS cause coming on for further directions, the case was : —

Mico was general agent in England for Watkins, who was a merchant abroad, and at different times had received considerable consignments of goods, and upon the balance of account was in disburse. Afterwards Watkins consigned to him a parcel of logwood, for which he paid the charges, &c. Watkins coming to England, Mico said, as he was here, he might dispose of the goods himself: Watkins accordingly employs a broker to sell them, and Mico tells the broker, that Watkins intends to sell them himself, to save commission; and Mico gave orders to the warehouseman, to deliver the goods to that broker. The broker sells them, and makes out bills of parcels to Watkins; and opens an account with Watkins, but takes no notice of Mico.

After the goods were sold, Mico begins to suspect Watkins' circumstances, and resorts to the broker, to know whether he has opened an account with Watkins.

The great question in the cause was, Supposing Mico had a lien on these goods and produce, so as to be entitled to retain them for the balance of the account; whether he has not parted with that right?

After argument at the bar, Lord Chancellor adjourned the cause to the 27th, and desired the four merchants, who were examined in the cause on the different sides, might attend in court, in order to be consulted by him upon the point. And accordingly this day they attended, viz., Mr. Alderman Baker and Bethell, Mr. Willetts and Fonereau; and after having asked them several questions, upon the custom and usage of merchants relating to the matter in doubt, his Lordship gave his opinion with great clearness, as follows : —

LORD HARDWICKE, Chancellor. This is a case of bankruptcy, in which this court always inclines to equality: yet if any person has a specific lien, or a special property in goods, which is clear and plain, it shall be reserved to him, notwithstanding the bankruptcy.

Question is, whether in this case, Mico is intitled to a specific lien, and consequently a preference in point of satisfaction out of the money arising by sale of these goods?

Two things are to be considered : —

1st. What lien a factor gains on goods consigned to him by a merchant abroad? and whether Mico gained such lien in this case?

2d. If he did, whether he has done anything to part with it?

As to 1st. All the four merchants, both in their examination in the cause, and now in court, agree, that if there is a course of dealings and general account between the merchant and factor, and a balance is due to the factor, he may retain the ship and goods, or produce, for such

balance of the general account, as well as for the charges, customs, &c., paid on the account of the particular cargo. They consider it as an interest in the specific things, and make them articles in the general account. Whether this was ever allowed in trover at law, where the goods were turned into money, I cannot say; nor can I find any such case. I have no doubt, it would be so in this court, if the goods *remained in specie*; nor do I doubt of its being so, where they are turned into money.

To the 2d question. I am of opinion Mico has parted with his right, and that it is for the benefit of trade to say he has.

All the merchants agree, that although a factor may retain for the balance of an account, yet if the merchant comes over, and the factor delivers the goods up to him, by his parting with the possession he parts with the specific lien. Such is the law of the land as to retainers in other cases.

Question. Whether this case amounts to the delivery up of the log-wood to the principal? I think it does. Mico suffers Watkins to employ a broker; and tells the broker, that Watkins intends to sell them himself, to save commission. Mico gives orders to the warehouseman to deliver the goods to the broker. The broker sells them, and makes out bills of parcels to Watkins, and takes no notice of Mico. It amounts to the same thing, as if Mico had delivered the goods in specie to Watkins.

It is safer for trade to hold it in this manner, than otherwise; for by that manner of acting, Mico gave Watkins a credit with other people (for the sale was public, and by that the goods appeared to be Watkins'), which would not have been the case if Mico had retained for the balance of his account.

It is better to allow that which is the public notorious transaction, than that which is secret. Suppose an action had been brought by Watkins against the broker, for money had and received, the broker could not have defended himself by saying, So much is due to Mico.

The merchants have admitted, that the specific lien as to the customs, charges, &c., does continue; even the law would have allowed it, if the goods had remained in specie; the goods being sold, makes the case stronger. But that is not now before me, being determined by his late Honor the MASTER OF THE ROLLS, and acquiesced in by the parties.¹

¹ "It was certainly doubtful, before the case of *Krutzer and Wilcocks*, 'whether a factor had a lien, and could retain for the balance of his general account.'" Per LORD MANSFIELD, C. J., in *Green v. Farmer*, 4 Burr. 2214, 2218.

See *Houghton v. Matthews*, 3 B. & P. 485; *McGraft v. Rugee*, 60 Wis. 406. A factor may sell to realize the amount of his debt, sometimes even against the orders of his principal. *Parker v. Brancker*, 22 Pick. 40; s. c. *Wambaugh*, Cas. Agency, 887. — ED.

NAYLOR *v.* MANGLES.

NISI PRIUS. 1794.

[*Reported 1 Esp. 109.*]

ASSUMPSIT for money had and received.

The plaintiff had purchased from one Boyne twenty-five hogsheads of sugars then lying in the defendant's warehouses, who was a wharfinger. Boyne was in debt to the defendant to the amount of £167, part of which only was for the charges of these twenty-five hogsheads of sugar, the remainder was for the balance of a general account, for which the defendant claimed a lien, and refused to deliver them to the plaintiffs till the whole sum was paid. The plaintiffs paid him the whole money, and then brought this action to recover it back.

The whole question turned upon the point whether a wharfinger had a lien for the balance of a general account upon the goods in his possession.

The counsel for the defendant said that it had been decided in three different cases that they had, and called witnesses to prove it, with which the jury seemed completely satisfied.

LORD KENYON said, liens were either by common law, usage, or agreement. Liens by common law were given where a party was obliged by law to receive goods, etc., in which case, as the law imposed the burden, it also gave him the power of retaining, for his indemnity. This was the case of innkeepers, who had by law such a lien. That a lien from usage was matter of evidence. The usage in the present case had been proved so often, he said it should be considered as a settled point that wharfingers had the lien contended for.¹

Bearcroft, Shepherd, and Park, for the plaintiff.

Erskine, for the defendant.

IN RE WITT.

CHANCERY DIVISION. 1876.

[*Reported 2 Ch. D. 489.*]

THIS was an appeal from a decision of Mr. Registrar Pepys, acting as Chief Judge in Bankruptcy.

G. A. Witt & Co., general merchants, filed a liquidation petition, under which J. Shubbrook was appointed trustee. Perrott & Perrott were packers, and the debtors had been in the habit of employing them to pack goods for them for shipment abroad. The goods,

¹ See *Holderness v. Collinson*, 7 B. & C. 212. — ED.

when purchased by the debtors, were sent to the warehouse of Perrott & Perrott, where they were warehoused, packed, and sent off for shipment as directed by the debtors. At the commencement of the liquidation, Perrott & Perrott had in their warehouse various parcels of goods belonging to the debtors, which had been sent to them at different times, and there was due to them from the debtors the sum of £28 19s. 7d., being the amount of their charges for packing other goods for the debtors. The trustee requested Perrott & Perrott to pack all the goods in one case and forward them to the docks for shipment. This was done, and their charge for doing it was £2 1s. They claimed to be entitled to a general lien on the goods, and refused to deliver them up except upon payment by the trustee, not only of the £2 1s., but also of the £28 19s. 7d. The trustee tendered the £2 1s., and demanded delivery of the goods, which was refused. He then applied to the court for an order that Perrott & Perrott should deliver up the goods on payment of the £2 1s.

Affidavits were made by two persons engaged in the trade of packers to the effect that by the custom of trade a packer has a general lien upon the goods of his customers in his possession for the amount of his charges, not only in respect of the particular goods, but also in respect of any other goods of the customer. In opposition to this evidence, one of the debtors made an affidavit in which he said that neither he nor his co-debtor knew of any such alleged custom of trade. The Registrar was of opinion that the lien claimed was established, and he dismissed the trustee's application with costs. The trustee appealed.

Davey, Q. C., and *F. O. Crump*, for the appellant. The Registrar founded his decision on *Ex parte Deeze*, 1 Atk. 228. In many text-books, no doubt, that case has been treated as showing that packers have a general lien, and the marginal note is to that effect. But when the case is looked at, it is evident that the marginal note is wrong, and that the decision was based upon the mutual credit clause. *Ex parte Ockenden*, 1 Atk. 235, and *Rose v. Hart*, 8 Taunt. 499, show that it was so. To establish a general lien by implication, it must be shown, either that its existence was actually known to the person against whom it is claimed, or that it exists by virtue of a custom of trade so widely known that the court will impute knowledge of it to him. *Holderness v. Collinson*, 7 B. & C. 212. The law does not favor general lien. *Bock v. Gorrissen*, 30 L. J. (Ch.) 39. In the most recent text-books on mercantile law, packers are not mentioned among the persons who have a general lien.

[*De Gex, Q. C.*, for Perrott & Co., referred to *Savill v. Barchard*, 4 Esp. 53, in which Lord Kenyon said that packers had a general lien, and to *Green v. Farmer*, 4 Burr. 2214, in which Lord Mansfield said it was settled in 1755 that a packer, being in the nature of a factor, would be entitled to a lien.]

That was because packers then often acted as factors, making advances to their principals, which they do not do now. In the recent case of *Achard v. Ring*, 31 L. T. (N. S.) 647, although an alleged custom had been in a prior case found judicially by the Court of Queen's Bench, yet, on the evidence, the jury, in accordance with the direction of Cockburn, L. C. J., found that the alleged custom did not exist.

De Gex, Q. C., and *Brough*, for the respondents, were not called on.

JAMES, L. J. I think it is too late now to attempt to set aside that which has been considered law for so many years, and I must say I do not see the injustice of it. I agree with what Lord Hardwicke said in *Ex parte Deeze*, 1 Atk. 228; it seems to me to be very good sense and justice. A man has goods in his possession which he has received in the ordinary course of trading, and he is asked to deliver them up, and at the same time he has a claim against the person who asks him to deliver them up. I think he has a perfect right to keep them. Under the Judicature Acts, I think, if an action were brought for the goods in trover or detinue, by means of a counterclaim the whole matter might be settled in one action. I certainly think this law with regard to lien is a very proper one; it has been settled for a great many years, and I do not see why we should endeavor to limit the effect of the decisions. The Registrar's order must be affirmed.

MELLISH, L. J. I am of the same opinion. From what Lord Mansfield said in *Green v. Farmer*, 4 Burr. 2214, and what was said by Lord Hardwicke in *Ex parte Deeze*, it seems to me clear that in the middle of the last century it was settled that a packer had a general lien. At that time packers were to a certain extent considered as factors; they used to make advances to their customers. But, it having been established that packers had a general lien at that time, I cannot think the circumstance that they do not now so frequently as they did then make advances should be sufficient to take away their right of general lien. It having been established that they had such a lien then, there can be little doubt that it would continue. Therefore, in the present case, if a single affidavit of the custom had been produced, that would have been sufficient evidence, if any evidence is required at all. If the existence of this lien is ever seriously to be contested, and it is sought to prove that by the present usage of trade packers have not a general lien, it must be done in quite a different way from merely bringing the customer himself to say that he never heard of the general lien. I think the determination of the Registrar was right.

BAGGALLAY, J. A. I am of the same opinion.

RUSHFORTH v. HADFIELD.

KING'S BENCH. 1805.

[Reported 7 East, 224.]

THIS was an action of trover to recover the value of a quantity of cloth which the bankrupts had sent by the defendants as common carriers, who claimed a lien upon it for their general balance due to them as such carriers for other goods before carried by them for the bankrupts. The plaintiffs had tendered the carriage price of the particular goods in dispute, and the sole question was, whether the defendants, as common carriers, had a lien for their general balance. On the first trial a verdict was found for the defendants, which this court thought was not sustained by the evidence, and therefore they granted a new trial. 6 East, 519. The cause was again tried at the last assizes at York, before *Chambre, J.*, when the defendants' book-keepers in London, at Stamford, and at Huddersfield, swore to their practice to retain goods for their general balance, and particularized one instance in December, 1799, where an action was brought, which being referred, was decided on another point; a second in May, 1800, where there was no bankruptcy; a third in May, 1803, where the bankrupt's assignee demanded the goods but afterwards paid the balance; a fourth and a fifth in the same year, when the individuals paid the balance, but no bankruptcy intervened; and a sixth instance, of the like sort as the last, in 1804. In addition to these, Welch, a carrier from Manchester and Leeds, deposed to an instance of retention of goods for the general balance three years back, where a bankruptcy intervened, and the assignees disputed the payment at first, but afterwards paid the balance; and to two other instances of goods sent to Glasgow; one where the carriage of the particular goods was £3 and the general balance £20; another where the carriage was a few shillings and the general balance £8; in both instances bankruptcies intervened, and the assignees paid the general balance. Hanley, a Northallerton carrier, spoke to two instances of retainer of goods, twelve and thirteen years ago, till the individuals paid the general balance; but neither were bankrupts. The book-keeper of Pickford, a carrier from London to Liverpool, particularized an instance of retaining for the general balance in 1792, where the vendee became bankrupt; but there the vendor stopped *in transitu*, and he paid the general balance at the end of two months; a second similar instance in the same year; a third instance in 1795, where the senders became bankrupts, and their general balance was paid by the vendees; a fourth in 1795, where the goods of an individual, not bankrupt, were detained several years, but no account how the matter was finally settled; and two other like instances in 1794 and 1795. And Clark, a Leicester carrier, also mentioned two instances, one in 1775, the other afterwards, of retaining the goods of solvent individuals till they paid

their general balance. All these carriers, who had followed their occupation from twenty to thirty years and upwards, deposed generally to their custom of retaining goods for their general balance in other instances as well as in those particularized. It was left to the jury to decide whether the usage were so general as to warrant them in presuming that the bankrupts knew it, and understood that they were contracting with the defendants in conformity to it; in which case they were to find for the defendants; otherwise they were told that the general rule of law would entitle the plaintiffs to a verdict. On this direction the jury found for the plaintiffs; which was moved to be set aside in last Michaelmas term, as a verdict against all the evidence.

Cockell, Serjt., now showed cause against the rule.

Park and *Wood*, contra.

LORD ELLENBOROUGH, C. J. It is too much to say that there has been a general acquiescence in this claim of the carriers since 1775, merely because there was a particular instance of it at that time. Other instances were only about ten or twelve years back, and several of them of very recent date. The question, however, results to this, What was the particular contract of these parties? And as the evidence is silent as to any express agreement between them, it must be collected either from the mode of dealing before practised between the same parties, or from the general dealings of other persons engaged in the same employment, of such notoriety as that they might fairly be presumed to be known to the bankrupt at the time of his dealing with the defendants, from whence the inference was to be drawn that these parties dealt upon the same footing as all others did, with reference to the known usage of the trade. But at least it must be admitted that the claim now set up by the carriers is against the general law of the land, and the proof of it is therefore to be regarded with jealousy. In many cases it would happen that parties would be glad to pay small sums due for the carriage of former goods, rather than incur the risk of a great loss by the detention of goods of value. Much of the evidence is of that description. Other instances, again, were in the case of solvent persons, who were at all events liable to answer for their general balance. And little or no stress could be laid on some of the more recent instances not brought home to the knowledge of the bankrupt at the time. Most of the evidence therefore is open to observation. If indeed there had been evidence of prior dealings between these parties upon the footing of such an extended lien, that would have furnished good evidence for the jury to have found that they continued to deal upon the same terms. But the question for the jury here was, whether the evidence of a usage for the carriers to retain for their balance were so general as that the bankrupt must be taken to have known and acted upon it? And they have in effect found either that the bankrupt knew of no such usage as that which was given in evidence, or knowing, did not adopt it. And growing liens are always to be looked at with jealousy, and require stronger proof. They are

encroachments upon the common law. If they are encouraged, the practice will be continually extending to other traders and other matters. The farrier will be claiming a lien upon a horse sent to him to be shod. Carriages and other things which require frequent repair will be detained on the same claim; and there is no saying where it is to stop. It is not for the convenience of the public that these liens should be extended further than they are already established by law. But if any particular inconvenience arise in the course of trade, the parties may, if they think proper, stipulate with their customers for the introduction of such a lien into their dealings. But in the absence of any evidence of that sort to affect the bankrupt, I think the jury have done right in negating the lien claimed by the defendants on the score of general usage.

GROSE, J. This lien is attempted to be set up by the defendants, not upon the ground of any particular contract or previous transactions between them and the bankrupt, but on the ground of previous transactions between them and other parties, and between other carriers and their customers. And it is admitted that the question upon this evidence was properly left to the jury, that they might find a verdict for the defendants, if the usage for the carriers to retain for their balance of account were so general as that they must conclude that these parties contracted with the knowledge and adoption of such usage. The jury have found in the negative. And I take it to be sound law, that no such lien can exist except by the contract of the parties expressed or implied.

LAWRENCE, J. The most which can be said on the part of the defendants is, that there was evidence which might have warranted the jury to find the other way, but it was for them to decide. This is a point which the carriers need not be so solicitous to establish. It is agreed that they have a lien at common law for the carriage price of each particular article. If then it be not convenient for the consignee to pay for the carriage of the specific goods at the time of delivery, it is very easy for the carriers to stipulate that they shall have a lien for their balance upon any other goods which they may thereafter carry for him. It is not fit to encourage persons to set up liens contrary to law. The carriers' convenience certainly does not require any extension of the law; for they have already a lien for the carriage price of the particular goods, and if they choose voluntarily to part with that, without such a stipulation as I have mentioned, there is no reason for giving them a more extensive lien in the place of that which they were entitled to. I should not be sorry, therefore, if it were found generally that they have no such lien as that now claimed upon the ground of general usage.

LE BLANC, J. This is a case where a jury might well be jealous of a general lien attempted to be set up against the policy of the common law, which has given to carriers only a lien for the carriage price of the particular goods. The party, therefore, who sets up such a claim ought

to make out a very strong case. But upon weighing the evidence which was given at the trial, I do not think that this is a case in which the court are called upon to hold out any encouragement to the claim set up, by overturning what the jury have done, after having the whole matter properly submitted to them. *Rule discharged.*¹

BEVAN v. WATERS.

NISI PRIUS. 1828.

[Reported Mood. & M. 235.]

ASSUMPSIT for goods sold and delivered, and work and labor.

The question in the cause was, whether the defendant was liable to the plaintiff for the training of a race-horse, which the defendant had bought of a third person, whilst in the plaintiff's possession, and which had been given up to the defendant under an agreement, as was contended, to pay for the training, in consideration of the abandonment of the plaintiff's lien. The defendant contended that there was no lien, and the detention was altogether wrongful, under the authority of *Wallace v. Woodgate*, R. & M. N. P. C. 193.

Wilde, Serjeant, and *R. V. Richards*, for the plaintiff.

Jones, Serjeant, for the defendant.

BEST, C. J. It was certainly held in that case, on the authority of *Yorke v. Grenaugh*, 2 Ld. Raym. 866, that a livery-stable keeper has no lien; but this case goes farther, and on the principle of the common law, that where the bailee expends labor and skill in the improvement of the subject delivered to him, he has a lien for his charge, I think the trainer has a lien for the expense and skill bestowed in bringing the horse into condition to run at races.

*Verdict for the plaintiff.*²

JUDSON v. ETHERIDGE.

EXCHEQUER. 1833.

[Reported 1 Cr. & M. 743.]

DETINUE for a gelding. Plea: *actio non*, because he says that the said gelding, in the said declaration mentioned, was on the day and

¹ See *Skinner v. Upshaw*, 2 Ld. Raym. 752; *Hurd v. Hartford & N. Y. Steamboat Co.*, 40 Conn. 48; *Fuller v. Bradley*, 25 Pa. 120; *Lane v. Old Colony R. R. Co.*, 14 Gray, 143; *Schneider v. Evans*, 25 Wis. 241. — Ed.

² Part of the case relating to another point is omitted. *Harris v. Woodruff*, 124 Mass. 205, accord. See *Lord v. Jones*, 24 Me. 439. — Ed.

year aforesaid delivered by the plaintiff to the defendant to be stabled and taken care of, and fed and kept by the defendant for the plaintiff for remuneration and reward, to be paid by the plaintiff to the defendant in that behalf. And the defendant in fact further saith, that afterwards, and before and at the time of the commencement of this action, to wit, on the 16th day of March, 1833, in the county aforesaid, the plaintiff became and was indebted to the defendant in a large sum of money, to wit, the sum of £10, being a reasonable and fair remuneration and reward in that behalf, for and in respect of the defendant having before then stabled and taken care of, and fed and kept, the said gelding for the plaintiff, under and by virtue of the said delivery and bailment. And the said defendant in fact further saith, that the said sum of £10 is still due and owing to the defendant. And for which reason he, the defendant, hath, from the time of the delivery of the said gelding, hitherto detained and still detains the same, as he lawfully may, for the cause aforesaid. General demurrer and joinder.

Mansel, in support of the demurrer.

Erle, contra.

LORD LYNTHURST, C. B. The question is on the sufficiency of the plea. Now, the plea states that the horse was delivered by the plaintiff to the defendant, to be stabled and taken care of, and fed and kept by the defendant for the plaintiff, for remuneration and reward, to be paid by the plaintiff to the defendant in that behalf; it then states that the plaintiff became indebted to the defendant in the sum of £10 — being a reasonable and fair remuneration and reward — for and in respect of the defendant having stabled and taken care of, and fed and kept the horse under and by virtue of the said delivery and bailment; and so justifies the detention until that sum should be paid. Upon this plea the question is, whether, on the state of facts disclosed, the defendant has or has not a lien upon the horse; I am of opinion that he has no lien. The present case is distinguishable from the cases of workmen and artificers, and persons carrying on a particular trade, who have been held to have a lien, by virtue of labor performed in the course of their trade, upon chattels bailed to them. The decisions on the subject seem to be all one way. In *Chapman v. Allen*, it was decided that a person receiving cattle to agist had no lien. In *Yorke v. Grenaugh*, it was held, not merely by Lord Chief Justice Holt, but by the whole court in their decision, that a livery-stable keeper had no lien. As to the case of *Jacobs v. Latour*, that, so far from establishing the right of lien, confirms the former decisions; for Lord Chief Justice Best expressly draws the distinction between a trainer, who bestows his skill and labor, and a livery-stable keeper; between horses taken in by a trainer and altered in their value by the application of his skill and labor, and horses standing at livery without such alteration. When the case came on before the Court of Common Pleas, that distinction seems to have been supported. It appears to me, therefore, that the present case is decided by the concurrence of all the authorities.

VAUGHAN, B. I am of opinion, that it is clear, from the authorities on this subject, that the present defendant had no right to detain the horse in question, and consequently that our judgment must be for the plaintiff.

BOLLAND, B. In deciding against the right of lien in this case we break in upon no former decisions. Admitting that a trainer has a lien, it must be on the ground that he has done something for the benefit and improvement of the animal. The doctrine might, perhaps, be extended further so as to embrace the case of a breaker, into whose hands a young horse is placed to be broken in. The breaker makes it a different animal. The chattel is improved by the application of his labor and skill. In the present case it does not appear that anything was to be done to the animal, to improve it or render it a different animal by the application of the skill and labor of the bailee.

GURNEY, B., concurred.

*Judgment for the plaintiff.*¹

JACKSON v. CUMMINS.

EXCHEQUER. 1839.

[Reported 5 M. & W. 342.]

TRESPASS for breaking and entering an outhouse and premises belonging to the plaintiff, and seizing and driving away ten cows, the property of the plaintiff, and converting and disposing of the same to the defendants' own use, &c.

The defendants pleaded, first, not guilty; secondly, as to taking &c. two of the cows, that the said cows, for the space of eight months before the said time when &c., had been depastured, agisted, and fed by the defendant Charles Cummins for the plaintiff, in and upon certain lands of him the said Charles Cummins, at the request of the plaintiff, for a certain reward and remuneration to be paid the said Charles Cummins by the plaintiff, and there was and still is due and owing to the said C. Cummins from the plaintiff the sum of £16 5s., for and in respect of the said agistment of the said two cows; and that it was agreed between the plaintiff and defendant Charles Cummins, that the said C. Cummins should retain, have, and take and keep the possession of the said two cows so long as the said sum of £16 5s. should remain unpaid; that the said two cows then and at the time of the said agreement were in the possession of the said C. Cummins, and so remained until the plaintiff fraudulently, unlawfully, and wrongfully took them out of the same as hereinafter mentioned; that afterwards, and after the said agreement, and whilst the said two cows were in the possession of the said C. Cummins under the same, and whilst the said C.

¹ *Grinnell v. Cook*, 3 Hill, 485, accord.—ED.

Cummins had a lien upon the same by law and by the agreement aforesaid, and just before the said time when &c., the plaintiff wrongfully, unlawfully, and surreptitiously, and contrary to the said agreement, with force and arms, broke and entered the said close of the said C. Cummins in which the said two cows were depasturing and agisting as aforesaid, and wrongfully, fraudulently, unjustly and unlawfully took, carried, and drove away the same out of the said close of the said C. Cummins, and put and placed the same in the said outhouse and premises in the declaration mentioned, without paying the said sum so agreed to, and then due to the said C. Cummins. The plea concluded with a justification by the defendant Cummins in his own right, and by the other defendants as his servants, in peaceably entering the outhouse and premises, in order to retake the cattle, and retaking them accordingly.

The plaintiff took issue on the first plea, and to the second replied *de injuria*.

The cause was tried before *Parke*, B., at the last Assizes for Yorkshire, when it was proved that the cows had been depastured on land belonging to the defendant. The jury found that there was no such agreement as stated in the plea, that the defendant should retain and keep possession of the cows until the amount due for the pasturage was paid, and thereupon found a verdict for the plaintiff, the learned judge reserving leave to the defendant to move to enter a nonsuit, in case the court should be of opinion that a lien existed at common law for the agistment of cattle. Alexander having, in Easter Term last, obtained a rule accordingly.

Cresswell now showed cause.

Alexander, in support of the rule.

PARKE, B. I am of opinion that this rule ought to be discharged. The first question is, whether it was competent for the defendant, under this plea, which speaks of a lien by agreement, to set up a claim for a lien at common law? If it were necessary to decide that question, I should say that I think it was competent for him to do so. The plaintiff, it is true, might have demurred specially to the plea for duplicity, in setting up two distinct grounds of lien, viz. by force of an agreement, and by the general law; but as it is, the averment of the agreement for a lien may be rejected, and the claim of lien under the general law supported, should such really exist. I also think that, after the recent decision in *Owen v. Knight*, 4 Bing. N. C. 54; 5 Scott, 307, as to the effect of lien in actions of trover, the defendant would have done better to have pleaded that the plaintiff was not possessed of these cows; which plea would have been supported by proof of the lien, giving to the defendant a special property in them at the time of the trespass. It is not, however, necessary to decide either of these points, because I think that by the general law no lien exists in the case of agistment. The general rule, as laid down by Best, C. J., in *Bevan v. Waters*, and by this court in *Scarfe v. Morgan*, is, that by the general

law, in the absence of any special agreement, whenever a party has expended labor and skill in the improvement of a chattel bailed to him, he has a lien upon it. Now, the case of agistment does not fall within that principle, inasmuch as the agister does not confer any additional value on the article, either by the exertion of any skill of his own, or indirectly by means of any instrument in his possession, as was the case with the stallion in *Scarfe v. Morgan*; he simply takes in the animal to feed it. In addition to which, we have the express authority of *Chapman v. Allen* that an agister has no lien; and although possibly that case may have been decided on the special ground that there had been an agreement between the parties, or a conversion of the animal had taken place, still it is also quite possible that it might have proceeded on the more general principle, that no lien can exist in the case of agistment; and it was so understood by this court in *Judson v. Etheridge*. The analogy, also, of the case of the livery-stable keeper, who has no lien by law, furnishes an additional reason why none can exist here: for this is a case of an agistment of milch cows, and, from the very nature of the subject-matter, the owner is to have possession of them during the time of milking; which establishes that it was not intended that the agister was to have the entire possession of the thing bailed; and there is nothing to show that the owner might not, for that purpose, have taken the animals out of the field wherein they were grazing, if he had thought proper so to do. This claim of lien is therefore inconsistent with the necessary enjoyment of the property by the owner. As to the case of the training groom it is not necessary to say anything, as it has not been formally decided; for in *Jacobs v. Latour*, 5 Bing. 130; 2 M. & P. 201, the point was left undetermined. It is true, there is a *Nisi Prius* decision of Best, C. J., in *Bevan v. Waters*, that the trainer would have a lien, on the ground of his having expended labor and skill in bringing the animal into condition to run at races; but it does not appear to have been present to the mind of the judge, nor was the usage of training to that effect explained to him, that when horses are delivered for that purpose, the owner has always a right, during the continuance of the process, to take the animal away, for the purpose of running races for plates elsewhere. The right of lien, therefore, must be subservient to this general right, which overrides it; so that I doubt if that doctrine would apply where the animal delivered was a race-horse, as that case differs much from the ordinary case of training.¹ I do not say that the case of *Bevan v. Waters* was wrongly decided; I only doubt if it extends to the case of a race-horse, unless perhaps he was delivered to the groom to be trained for the purpose of running a specified race, when of course these observations of mine would not apply. But, at all events, I am clear that this agister has no lien, as his case certainly does not come within the general principles which have been established; in addition to which, such a claim would be

¹ Approved and followed in *Forth v. Simpson*, 13 Q. B. 680. — Ed.

inconsistent with the more general right exerciseable by the owner of the cattle.

ALDERSON, B. I agree that the agister has no lien in this case. On the first point, however, I give no opinion.

MAULE, B. I think the effect of this plea is to set up a claim of lien under the agreement only; for, if understood in the sense which would make it not demurrable, it says, during the continuance of such a state of circumstances, these cattle were taken away. On the other point, I agree with the rest of the court that no lien exists.

*Rule discharged.*¹

¹ *Goodrich v. Willard*, 7 Gray, 183, *accord.*; *Lewis v. Tyler*, 23 Cal. 364.

"The non-existence of the promise implied, in fact, in early times, also makes intelligible a distinction in the law of lien, which greatly puzzled Lord Ellenborough and his colleagues. Williams, J., is reported to have said in 1605: 'If I put my cloths to a tailor to make up, he may keep them till satisfaction for the making. But if I contract with a tailor that he shall have so much for the making of my apparel, he cannot keep them till satisfaction for the making.' 2 Roll. Ab. 92, pl. 1, 2. In the one case, having no remedy by action, he was allowed a lien, to prevent intolerable hardship. In the other, as he had a right to sue on the express agreement, it was not thought necessary to give him the additional benefit of a lien. An innkeeper had the further right of selling a horse as soon as it had eaten its value, if there were no express contract. For, as he had no right of action for its keep, the horse thereafter was like a *damnosa hereditas*. *The Hostler's case* (1605), Yelv. 66, 67. This right of sale disappeared afterwards with the reason upon which it was founded. *Jones v. Pearle*, 1 Stra. 556. As soon as the right to recover upon an implied *quantum meruit* was admitted, the reason for this distinction vanished. But the acquisition of a new remedy by action did not displace the old remedy by lien. 'And it was resolved that an innkeeper may detain a horse for his feeding, and yet he may have an action on the case for the meat.' *Watbrooke v. Griffith* (1609), Moore, 876, 877. The old rule, expressed, however, in the new form of a distinction between an express and an implied contract, survived to the present century. *Chapman v. Allen*, Cro. Car. 271; *Collins v. Ongly*, Selw. N. P. (13th ed.) 1312, n. (x), per Lord Holt; *Brennan v. Currant* (1755) Say. 224, Buller, N. P. (7th ed.) 45, n. (c); *Cowell v. Simpson*, 16 Ves. 275, 281, per Lord Eldon; *Scarfe v. Morgan*, 4 M. & W. 270, 283, per Parke, B. At length, in 1816, the judges of the King's Bench, unable to see any reason in the distinction, and unconscious of its origin, declared the old *dicta* erroneous, and allowed a miller his lien in the case of an express contract. *Chase v. Westmore*, 5 M. & Sel. 180.

"The career of the agistor's lien is also interesting. That such a lien existed before the days of implied contracts is intrinsically probable, and is also indicated by several of the books. 2 Roll. Ab. 85, pl. 4 (1604); *Mackerney v. Erwin* (1628), Hutt. 101; *Chapman v. Allen* (1632), 2 Roll. Ab. 92, pl. 6, Cro. Car. 271, s. c. But in *Chapman v. Allen*, 2 Roll. Ab. 92, pl. 6, Cro. Car. 271, s. c. (1632), the first reported decision involving the agistor's right of detainer, there happened to be an express contract, and the lien was accordingly disallowed. When a similar case arose two centuries later in *Jackson v. Cummins*, 5 M. & W. 342, this precedent was deemed controlling, and, as the old distinction between express and implied contracts was no longer recognized, the agistor ceased to have a lien in any case. Thus was established the modern and artificial distinction in the law of lien between bailees for agistment and 'bailees who spend their labor and skill in the improvement of the chattels' delivered to them. The agistor has a lien by the Scotch law. Schouler, *Bailments* (2d ed.), § 122." J. B. Ames in 2 Harv. L. R. 61, 62. See *Kelsey v. Lane*, 28 Kan. 218, 223.

In many jurisdictions, a lien is given by statute to agistors and stable-keepers. 1 Jones, *Liens* (2d ed.), §§ 647-682. *Fishell v. Morris*, 57 Conn. 547. — ED.

STEINMAN v. WILKINS.

SUPREME COURT OF PENNSYLVANIA. 1844.

[Reported 7 W. & S. 466.]

THE plaintiff brought this action of trover against the defendant, who is a warehouseman in Clarion County, on the Allegheny River, for the supposed conversion of certain goods retained for the price of warehouse room, being part of a larger lot which was stored in his warehouse by Hamilton & Humes, of whom the plaintiff is the general assignee. The greater part had been delivered to Hamilton & Humes, and the residue having been demanded without tender of any charges, M'Calmont (President of the Common Pleas of Clarion County) directed the jury that though the defendant could not retain for the general balance of his account, he might retain for all the charges on all the goods forwarded to him at the same time. A bill of exceptions was sealed, and the point was argued on a writ of error to this court by —

Gilmore, for plaintiff in error;

Howe, for defendant in error.

The opinion of the court was delivered by —

GIBSON, C. J. Though a plurality of the barons in *Rex v. Humphery*, M'Clel. & Y. 194–195, dissented from the *dictum* of Baron Graham that a warehouseman has a lien for a general balance, like a wharfinger, I do not understand them to have intimated that he has no lien at all. They spoke of it as an entity, and seem to have admitted that he has a specific lien, though not a general one. There is a well-known distinction between a commercial lien, which is the creature of usage, and a common-law lien, which is the creature of policy. The first gives a right to retain for a balance of accounts; the second, for services performed in relation to the particular property. Commercial or general liens, which have not been fastened on the law merchant by inveterate usage, are discountenanced by the courts as encroachments on the common law; and for that reason it would be impossible to maintain the position of Baron Graham, for there is no evidence of usage as a foundation for it, and no text-writer has treated of warehouse room as a subject of lien in any shape. In *Rex v. Humphery*, it was involved in the discussion only incidentally; and I have met with it in no other case. But there is doubtless a specific lien provided for it by the justice of the common law. From the case of a chattel bailed to acquire additional value by the labor or skill of an artisan, the doctrine of specific lien has been extended to almost every case in which the thing has been improved by the agency of the bailee. Yet in the recent case of *Jackson v. Cummins*, 5 Mees. & Welsb. 342, it was held to extend no further than to cases in which the bailee has directly conferred additional value by labor or skill, or indirectly by the instrumentality of

an agent under his control; in supposed accordance with which it was ruled that the agistment of cattle gives no lien. But it is difficult to find an argument for the position that a man who fits an ox for the shambles, by fattening it with his provender, does not increase its intrinsic value by means exclusively within his control. There are certainly cases of a different stamp, particularly *Bevan v. Waters*, Mood. & Malk. 235, in which a trainer was allowed to retain for fitting a race-horse for the turf. In *Jackson v. Cummins* we see the expiring embers of the primitive notion that the basis of the lien is intrinsic improvement of the thing by mechanical means; but if we get away from it at all, what matters it how the additional value has been imparted, or whether it has been attended with an alteration in the condition of the thing? It may be said that the condition of a fat ox is not a permanent one; but neither is the increased value of a mare in foal permanent; yet in *Scarfe v. Morgan*, 4 Mees. & Welsb. 270, the owner of a stallion was allowed to have a lien for the price of the leap. The truth is, the modern decisions evince a struggle of the judicial mind to escape from the narrow confines of the earlier precedents, but without having as yet established principles adapted to the current transactions and convenience of the world. Before *Chase v. Westmore*, 5 Maule & Selw. 180, there was no lien even for work done under a special agreement; now, it is indifferent whether the price has been fixed or not. In that case Lord Ellenborough, alluding to the old decisions, said that if they "are not supported by law and reason, the convenience of mankind certainly requires that our decisions should not be governed by them;" and Chief Justice Best declared in *Jacobs v. Latour*, 5 Bing. 132, that the doctrine of lien is so just between debtor and creditor, that it cannot be too much favored. In *Kirkham v. Shawcross*, 6 T. R. 17, Lord Kenyon said it had been the wish of the courts, in all cases and at all times, to carry the lien of the common law as far as possible; and that Lord Mansfield also thought that justice required it, though he submitted when rigid rules of law were against it. What rule forbids the lien of a warehouseman? Lord Ellenborough thought, in *Chase v. Westmore*, that every case of the sort was that of a sale of services performed in relation to a chattel, and to be paid for, as in the case of any other sale, when the article should be delivered. Now, a sale of warehouse room presents a case which is bound by no pre-established rule or analogy; and, on the ground of principle, it is not easy to discover why the warehouseman should not have the same lien for the price of future delivery and intermediate care that a carrier has. The one delivers at a different time, the other at a different place; the one after custody in a warehouse, the other in a vehicle; and that is all the difference. True, the measure of the carrier's responsibility is greater; but that, though a consideration to influence the quantum of his compensation, is not a consideration to increase the number of his securities for it. His lien does not stand on that. He is bound in England by the custom of the realm to carry for all employers at estab-

lished prices; but it is by no means certain that our ancestors brought the principle with them from the parent country as one suited to their condition in a wilderness. We have no trace of an action for refusing to carry; and it is notorious that the wagoners, who were formerly the carriers between Philadelphia and Pittsburg, frequently refused to load at the current price. Now, neither the carrier nor the warehouseman adds a particle to the intrinsic value of the thing. The one delivers at the place, and the other at the time, that suits the interest or the convenience of the owner of it, in whose estimation it receives an increase of its relative value from the services rendered in respect of it, else he would not have undertaken to pay for them. I take it, then, that, in regard to lien, a warehouseman stands on a footing with a carrier, whom in this country he closely resembles.

Now, it is clear from *Sodergren v. Flight & Jennings*, cited 6 East, 662, that where the ownership is entire in the consignee, or a purchaser from him, each parcel of the goods is bound, not only for its particular proportion, but for the whole, provided the whole has been carried under one contract; it is otherwise where to charge a part for the whole would subject a purchaser to answer for the goods of another, delivered by the bailee with knowledge of the circumstances. In this instance, the entire interest was in Hamilton & Humes, in whose right the plaintiff sues; and the principle laid down by the presiding judge was substantially right. On the other hand, the full benefit of it was not given to the defendant in charging that the demand and refusal was evidence of conversion. There was no evidence of tender to make the detention wrongful; and the defendant would have had cause to complain, had the verdict been against him, of the direction to deduct the entire price of the storage from the value of the articles returned, and to find for the plaintiff a sum equal to the difference. But there has been no error which the plaintiff can assign.

*Judgment affirmed.*¹

BRITISH EMPIRE SHIPPING COMPANY v. SOMES.

QUEEN'S BENCH. 1858.

[*Reported E. B. & E.* 353.]

ACTION for money had and received.² A case was stated substantially as follows: The plaintiffs were the owners of a ship called *The British Empire*. The defendants were shipwrights on a large scale. The plaintiffs employed the defendants to repair the ship, and she was taken into the defendant's dock at Blackwall, September 1, 1856. When the repairs were completed the defendants declined to let the

¹ *Schmidt v. Blood*, 9 Wend. 268, *accord.* Under New York statutes, a warehouseman has a general lien. *Stallman v. Kimberly*, 121 N. Y. 393. — ED.

² The following short statement is substituted for that in the report.

ship go until their bill for repairs was paid, or security given for its payment; and the plaintiffs not doing either, the defendants on November 25, 1856, gave the plaintiffs written notice that they should charge them £21 a day for the hire of their dry dock from the time when their account was delivered, November 20. The plaintiffs disputed the right of the defendants to make this charge, but on December 22, 1856, paid, under protest, the whole amount claimed by the defendants, which included the sum of £567 as rent of the dock for twenty-seven days at £21 a day. The question for the court was whether the defendants were entitled to retain the £567.

The case was argued in Easter Term, 1858. Before *Lord Campbell*, C. J., and *Wightman*, *Erle* and *Crompton*, JJ.

Blackburn, for the plaintiffs.

T. Jones, for the defendants.

LORD CAMPBELL, C. J., now delivered judgment.

We are of opinion that, under the circumstances stated in the special case, the defendants are not entitled to retain the sum paid to them in respect of the item of £567, or any other sum, as a compensation for the use of their dock in detaining the plaintiffs' ship. As artificers who had expended their labor and materials in repairing the ship which the plaintiffs had delivered to them to be repaired, the defendants had a lien on the ship for the amount of the sum due to them for these repairs; but we do not find any ground on which their claim can be supported to be paid for the use of their dock while they detained the ship under the lien against the will of the owners. There is no evidence of any special contract for such a payment. The defendants gave notice that they would demand £21 a day for the use of their dock during the detention: but the plaintiffs denied their liability to make any such payment, and insisted on their right to have their ship immediately delivered up to them. Nor does any custom or usage appear to authorize such a claim for compensation, even supposing that a wharfinger with whom goods had been deposited, he being entitled to warehouse-rent for them from the time of the deposit, might claim a continuation of the payment during the time he detains them in the exercise of right of lien till the arrears of warehouse-rent due for them is paid (see *Rex v. Humphery*, M'Cl. & Y. 173): there is no ground for a similar claim here, as there was to be no separate payment for the use of the dock while the ship was under repair, and the claim only commences from the refusal to deliver her up. The onus therefore is cast upon the defendants to show that, by the general law of England, an artificer who, exercising his right of lien, detains a chattel, in making or repairing which he has expended his labor and materials, has a claim against the owner for taking care of the chattel while it is so detained. But the claim appears to be quite novel; and, on principle, there is great difficulty in supporting it either *ex contractu* or *ex delicto*. The owner of the chattel can hardly be supposed to have promised to pay for the keeping of it while, against his will, he is deprived of the

use of it; and there seems no consideration for such a promise. Then the chattel can hardly be supposed to be wrongfully left in the possession of the artificer, when the owner has been prevented by the artificer from taking possession of it himself. If such a claim can be supported, it must constitute a debt from the owner to the artificer, for which an action might be maintained: when does the debt arise, and when is the action maintainable? It has been held that a coachmaker cannot claim any right of detainer for standage, unless there be an express contract to that effect, or the owner leaves his property on the premises beyond a reasonable time, and after notice has been given him to remove it. *Hartley v. Hitchcock*, 1 Stark. 408.

The right of detaining goods on which there is a lien is a remedy to the party aggrieved which is to be enforced by his own act; and, where such a remedy is permitted, the common law does not seem generally to give him the costs of enforcing it. Although the lord of a manor be entitled to amends for the keep of a horse which he has seized as an estray (*Henley v. Walsh*, 2 Salk. 686), the distrainer of goods which have been replevied cannot claim any lien upon them: *Bradyll v. Ball*, 1 Bro. C. C. 427. So, where a horse was distrained to compel an appearance in a hundred court, it was held that, after appearance, the plaintiff could not justify detaining the horse for his keep. *Bul. N. P.* 45.

If cattle are distrained damage feasant, and impounded in a pound overt, the owner of the cattle must feed them; if in a pound covert or close, "the cattle are to be sustained with meat and drink at the peril of him that distraineth, and he shall not have any satisfaction therefore." *Co. Litt.* 47 b.

For these reasons, on the question submitted to us, we give judgment for the plaintiffs. *Judgment for the plaintiffs.*¹

NOTE.—LIEN OF BANKER. A banker has a lien on all securities of a customer in his possession, or a right to retain out of moneys due the customer, for the general balance of his account. *Jourdain v. Lefevre*, 1 Esp. 66; *Brandao v. Barnett*, 12 Cl. & F. 787, 805; *Bank of the Metropolis v. New England Bank*, 1 How. 234, 239. *Appeal of Liggett*, 111 Pa. 291, *semble, contra*. But where the securities have been deposited for a specific purpose, there is no lien for a general balance. *Armstrong v. Chemical Nat. Bank*, 41 Fed. R. 234, 239; *Masonic Savings Bank v. Bangs*, 84 Ky. 135.

LIEN OF ATTORNEY OR SOLICITOR. An attorney or a solicitor has a lien on all papers of his client in his possession, for the general balance of account. *Sterling, ex parte*, 16 Ves. 258; *Hurlbert v. Brigham*, 56 Vt. 368. In *Walton v. Dickerson*, 7 Pa. 377, it was denied that in Pennsylvania an attorney had any lien; but see *McKelvey's Appeal*, 108 Pa. 615. In Massachusetts the question of the existence of an attorney's lien seems undecided; see *White v. Harlow*, 5 Gray, 463; *Simmons v. Almy*, 103 Mass. 33, 35.

VENDOR'S LIEN. The subject of Vendor's Lien is treated in courses and textbooks on Sale.

¹ See *Devereux v. Fleming*, 53 Fed. R. 401.—ED.

B. Lien given by Person other than Owner, when good against Owner.

ROBINSON v. WALTER.

KING'S BENCH. 1616.

[*Reported 3 Bulst. 269.*]

IN an action upon the case for a trover and conversion brought by the plaintiff against the defendant, being an innkeeper, for a horse.

The case, upon the defendant's plea in bar, was this: The defendant keeping a common inn, a stranger brings the plaintiff's horse into this common inn of the defendants, there sets him for some time, and afterwards goes his way, leaving the plaintiff's horse there as a pledge for his meat.

The defendant, being the innkeeper, being not paid for the meat of the horse, retains the horse for his meat; the plaintiff afterwards, being the true owner of the horse, and hearing that his horse was there, demanded his horse of the defendant, who refused to deliver him. Upon this he brings his action. The defendant by way of plea in bar, sets forth all this matter of his keeping a common inn, how that the horse was brought thither, and there left at meat, which was unpaid, and that he retained the horse for his meat, till he was satisfied for the same, and that if the plaintiff would pay him for his meat, he would then deliver the horse to him, but not otherwise; upon this plea the plaintiff demurred in law.

Upon the first opening of this case, the court inclined to be of opinion against the plaintiff; that the defendant's plea was good, and that he might well retain the horse, and that against the plaintiff, being the true owner of him, until he was satisfied by him for his meat, and notwithstanding his horse was left there by a stranger, unknown to the owner; and for this was remembered the books of 39 H. 6, fol. 18 b, and 5 H. 7, fol. 15 b, the case of the leather converted.

DODDERIDGE, Justice. This is a common inn, and the defendant a common innkeeper, and this his retainer here is grounded upon the general custom of the land: he is to receive all guests and horses that come to his inn; he is not bound to examine who is the true owner of the horse brought to his inn; he is bound, as he is an innkeeper, to receive them, and therefore there is very great reason for him to retain him, until he be satisfied for his meat which he hath eaten; and that the true owner of the horse cannot have him away, until he have satisfied the innkeeper for his meat.

The court agreed with him herein, but the court said, that this being a new and a good case, they held it fit to be argued by counsel on both

sides, and so for this purpose, this case was adjourned to a further time.

Afterwards, (S) Termin. Trin. 15 Jac. B. R., this case was moved again, and argued on both sides.

Divers authorities were cited, and reasons urged, and enforced for the defendant, that the plea was good. That the defendant being a common innkeeper, may retain a horse, brought into his inn, and there left, until he be paid for his meat, and for this purpose, Coke 8 pars. fol. 146, 147 a, the *Six Carpenters' Case*, was cited, and 5 E. 4, fol. 2 b, placito 16. That an hostler may well detain a horse, if the master will not pay for his meat, and so of a tailor a garment by him made, till he be paid for it; and so is 22 E. 4, fol. 49 b. Several reasons urged for this, as (S).

1. *In respectu loci*, this being a common inn, where he is compellable to receive horses coming thither, and is not to examine whose they are, and this place hath a privilege, as to a distress, not to be there distrained by another, as a millstone not to be distrained, by 14 H. 8, fol. 25 b; nor a horse at the smith's shop, by 22 E. 4, fol. 49 b, 7 H. 7, fol. 2 a. A horse not to be there distrained for the prejudice of the commonweal, nor yet in a market or fair; so that an inn is there compared to a market. A second reason of this (S),

2. Why he may detain a horse for his meat, nothing more reasonable, as it was urged. An infant shall be bound by his bond for his meat.

If one drives the cattle of another into the ground of I. S. he may, it was urged, detain them, till he be satisfied for the hurt done by them.

3. Because here was no default in the innkeeper, who did entertain him; neither is he to demand whose horse this was, for that every man hath a license in law, to come with his horses into an inn, and the innkeeper cannot put him back; and so is the *Six Carpenters' Case* before remembered; but he may detain them for their meat. Mich. 6 Jac. B. R. between *Harlow v. Wood*, the same case was (as is here now in question) and resolved that an innkeeper may retain and keep a horse left in his inn for his meat, though it be the horse of a stranger.

MOUNTAGUE, Chief Justice. Where one is hired to serve, there he shall not wage his law, because compellable. *Communia hospitia* are compellable to receive guests and their horses; and so he is to answer for them, which are brought thither; the custom of London is good and reasonable, how long to stay, not till he eats out more than his head; the innholder may sell him presently, and this is justifiable. Here in this case, the innkeeper said to the plaintiff, Prove the horse to be yours, pay for his meat, and you shall have him. This is no denial, nor yet any conversion, he claims no property at all; he only detains the horse, till he be satisfied for his meat, and so he may well do by the law; he may keep him, till he be paid for his meat, because he is compellable at the first to receive him.

DODDERIDGE, Justice. One who hath no keeping for his horse, doth devise this way to send his man with him to an inn, and to let him stand there, and afterwards to come thither himself, and of the innkeeper to demand his horse, and upon his refusal, to bring his action upon the case; this is a fine trick for the plaintiff to have his horse kept, and to give the innkeeper nothing for the same; but instead of paying of him for his meat, to pay him with an action, which he hath no cause so to do, as this case here is, the innkeeper may well justify the keeping of his horse, till he do pay him for his meat, which is all he desires to have.

HAUGHTON, Justice, differed in opinion. The party being the true owner of the horse, hath no other way to provide for himself, but this. The innkeeper hath his proper remedy against him, who brought and left the horse there for his meat, and for him thus to prejudice the owner of the horse, by the wrong of another, this will be very inconvenient.

CROKE, Justice. If a stranger takes my cattle, and puts them into the ground of another, he may well keep them till I pay him for their meat, and hurt there done. If a man's horse be stolen, and brought unto an inn, or if a man lends his horse to one for a day, and he keeps him three or four days, the innkeeper here was in no fault at all. If the horse was stolen and brought thither, he cannot charge the innkeeper with this, but he which brought him thither, and there left him. Here the innkeeper hath done no wrong at all, the owner is to satisfy him for his meat, because he was here compellable to receive him.

MOUNTAGUE. If a stranger takes the horse of another, and sets him up in an inn, if the horse was there stolen away, the party may have his remedy against the innkeeper.

If a man's servant carries his master's horse to an inn, and there leaves him, and he is stolen away; an action lieth here for the master, as well as for the servant, against the innkeeper.

DODDERIDGE agreed this to be so, if he knew him to be his servant; the owner is to pay for his meat, and it would be a very mischievous thing if it should be otherwise; for when a man hath lost his horse, he is to look for him, and when he hath found him in the inn, if he should not be enforced to pay for his meat, this would be a trick, to have his horse kept for nothing, and to have him brought by his servant to the inn. The owner hath a benefit, (S.) meat for his horse, and for the which he ought to pay.

CURIA. The pleading here is not good, therefore they did advise the party to plead to issue, and so to go to trial, and so judgment may then be given upon the event, but as the case here is; CROKE, DODDERIDGE, and MOUNTAGUE, clear of opinion for the defendant against the plaintiff.

HAUGHTON differed from them in opinion for the plaintiff.

And so upon this action here brought, and upon the demurrer to the defendant's plea, the opinion of the court was against the plaintiff, that

the demurrer was not good; and so the rule of the court was, *Quod querens nil capiat per billam*.

Nota. That the like case, as this principal case is, was in this court. Termin. Trin. 9 Jac. B. R., between *Skipwith* plaintiff, against *I. S.* an innkeeper (in a trover, and conversion for his horse, brought to the inn, by a stranger, and there detained for his meat) argued by the four judges, and the court therein divided WILLIAMS & CROKE Justices, That the innkeeper may keep the horse till he be paid for his meat.

YELVERTON & FENNER, Justices, *è contra*, touching this matter, *vide prima pars*, fol. 170.

Vide also, the custom of London, for an innkeeper to have a horse praised and sold for the meat he had eaten. Termino Trinit. 10 Jac. B. R. 1 pars, fol. 207. *Mosse* plaintiff, against *Townsend* defendant.¹

BROADWOOD v. GRANARA.

EXCHEQUER. 1854.

[Reported 10 Exch. 417.]

THIS was a case stated for the opinion of the court by consent of the plaintiffs and defendant, and by order of a judge.

The declaration stated that the defendant converted to his own use the plaintiffs' goods, — that is to say, a boudoir grand-pianoforte. The defendant pleaded, first, not guilty; secondly, that the goods were not the plaintiffs'. Upon which issues were joined.

The plaintiffs are, and at the time of the alleged conversion were, in partnership as manufacturers of pianofortes, in Great Pulteney Street, London. The defendant was, and is, the proprietor of an inn or hotel, called the Hotel de l'Europe, in Leicester Place, Leicester Square.

In March, 1853, a Monsieur Hababier, a foreigner and professional pianist, went to reside at the defendant's hotel, and remained there, occupying apartments, and occasionally taking his meals in the house, for some months. On the 28th of March Monsieur Hababier, then residing at the hotel, as before mentioned, went to the manufactory of the plaintiffs in Great Pulteney Street, and requested the use or loan of a grand-pianoforte. It has been, and is, usual for the plaintiffs to lend pianofortes to musical artists without charge; and in compliance with this request a grand-pianoforte was sent to the before-mentioned hotel for the use of Monsieur Hababier. This pianoforte remained at the hotel in possession of Monsieur Hababier, in his apartments, until the 9th of June following, when it was taken away and replaced by a

¹ See *Stirt v. Drungold*, 3 Bulst. 289; *Sunbolf v. Alford*, 3 M. & W. 248; *Binns v. Pigot*, 9 C. & P. 208. — ED.

boudoir grand-pianoforte, also supplied by the plaintiffs, without charge, to Monsieur Hababier.

Monsieur Hababier remained at the hotel until the 27th of June, and during that time incurred a bill for the use of the apartments, and for board, hire of carriages, and other accommodation, to a considerable amount. Some payments were made on account, but at the time of the demand and refusal hereinafter mentioned there was a balance due from him to the defendant of £46 3s. 5d., consisting in part of use of apartments, &c., after the 9th of June.

On the 27th of June the plaintiffs' clerks applied to the defendant for the last-mentioned pianoforte, and requested that it might be delivered to him for the plaintiffs. He, at the same time, handed to the defendant a written authority from Monsieur Hababier to deliver it to the plaintiffs. The defendant declined to deliver up the pianoforte. On the following day the clerk again went to the house of the defendant, taking with him a van and two porters, and again demanded the pianoforte. On this occasion the defendant asked him if he had brought any money, and being answered in the negative, said, "Unless Messrs. Broadwood pay my bill for the rent of the apartments I will not give up the piano."

It is admitted, for the purposes of this case, that the hotel of the defendant was and is an inn; and that the defendant was and is entitled to the rights of an innkeeper.

The defendant at all times knew the pianoforte in question was not the property of Monsieur Hababier, but that of the plaintiffs; and the plaintiffs at all times knew that the said Monsieur Hababier was stopping at an hotel. The balance due to the defendant from Monsieur Hababier is still unpaid.

The question for the opinion of the court is, whether, under the above circumstances, the plaintiffs are entitled to maintain the action. If the court shall be of opinion that the action is maintainable, the verdict is to be entered for the plaintiffs, with £100 damages. If the court shall be of opinion that the defendant had a right to detain the pianoforte, then the verdict is to be entered for the defendant.

Watson, for the plaintiffs.

Willes, for the defendant.

POLLOCK, C. B. We are all of opinion that the lien claimed by the defendant cannot prevail. I need not go through the series of decisions referred to, or the propositions propounded at the bar, because the limited ground on which I think the plaintiffs entitled to judgment is this: that there is no case which decides that an innkeeper has a right of lien under such circumstances as these. This is the case of goods, not brought to the inn by a traveller *as his goods*, either upon his coming to or whilst staying at the inn, but they are goods furnished for his temporary use by a third person, and known by the innkeeper to belong to that person. I shall not inquire whether, if the pianoforte had belonged to the guest, the defendant would have had a lien on it.

It is not necessary to decide that point, for the case finds that it was known to the defendant that the pianoforte was not the property of the guest, and that it was sent to him for a special purpose. Under these circumstances I am clearly of opinion that the defendant has no lien.

PARKE, B. I am of the same opinion. It is not necessary to advert to the decisions on the subject of an innkeeper's lien, because this is not the case of *goods brought by a guest to an inn* in that sense in which the innkeeper has a lien upon them; but it is the case of goods sent to the guest for a particular purpose, and known by the innkeeper to be the property of another person. It therefore seems to me that there is no pretence for saying that the defendant has any lien. The principle on which an innkeeper's lien depends is, that he is bound to receive travellers and the goods which they bring with them to the inn. Then, inasmuch as the effect of such lien is to give him a right to keep the goods of one person for the debt of another, the lien cannot be claimed except in respect of goods which, in performance of his duty to the public, he is bound to receive. The obligation to receive depends on his public profession. If he has only a stable for a horse he is not bound to receive a carriage. There was no ground whatever for saying that the defendant was under an obligation to receive this pianoforte.

ALDERSON, B. I am of the same opinion.

PLATT, B. The case of *Johnson v. Hill*, 3 Stark. 172, shows the principle of law which is applicable to the present case. If a person brings the horse of another to an inn, the innkeeper may detain it from the owner until its keep is paid. But if, as the jury found in *Johnson v. Hill*, the innkeeper knew that the person bringing the horse illegally got possession of it, and therefore had no right to pledge it for his debt, then the lien does not attach. Here the plaintiffs send a pianoforte to the room of the guest, and the innkeeper well knew that it was not the property of the guest, and that it was not competent for him to pledge it for a debt of his own. Then how can it be said that any act of the plaintiffs gave the defendant a right to detain the pianoforte for his guest's debt? The plaintiffs might have taken it away the next minute. The case does not fall within the principles of law relating to the lien of innkeepers.

Judgment for the plaintiffs.

THREFALL v. BORWICK.

QUEEN'S BENCH, 1872.

[*Reported L. R. 7 Q. B. 711.*]

DECLARATION for detaining a pianoforte of plaintiff.

First plea, not guilty; and, *inter alia*, third plea, that defendant was an innkeeper, and kept a common inn for the reception of trav-

ellers and others. That defendant had a lien upon the piano for money payable by one Butcher to defendant for lodging and entertainment for himself and his wife and sister, and that Butcher, being then lawfully possessed of the piano, brought it to the inn with him, and defendant detained it in exercise of his lien as innkeeper.

Issue joined; and replication to the third plea, that the piano was let on hire to Butcher by plaintiff for a certain time which had elapsed before the detention by defendant, and the piano was not goods which a traveller ordinarily travels with, and defendant was not bound by law to take it in, and plaintiff never authorized Butcher to pledge it or create any lien upon it.

Issue joined.

At the trial, at Lancaster Spring Assizes, 1872, before *Lush*, J., it appeared that the defendant kept the Ferry Hotel, on Lake Windermere, and that one Butcher came there with his wife and sister in April, 1871. In addition to board and lodging, Butcher had a private sitting-room, for which he paid 16s. a week. Butcher brought with him a pianoforte, which defendant thought was Butcher's own, but which he had in fact only hired of the plaintiff. This was put in the private sitting-room. After several weeks, Butcher left the hotel in defendant's debt for board, &c., £45; and, on demand by the plaintiff, the defendant claimed to detain the piano in exercise of his lien as innkeeper for the debt due by Butcher.

A verdict passed for defendant, with leave to move to enter it for plaintiff for twenty-two guineas.

A rule was obtained accordingly, on the ground that the defendant had no lien upon the plaintiff's piano.

Holker, Q. C., showed cause.

John Edwards, in support of the rule.

MELLOR, J. The rule must be discharged. It is not necessary to say anything as to the amendment of the pleadings, because we are all of opinion that the plaintiff's counsel has failed to show that the limits of the innkeeper's liability on the one hand, and of his privilege on the other, are such as he sought to establish. Whether or not the innkeeper would have been liable, if an indictment had been brought against him, for not receiving this guest and his goods, having accommodation for them, it is unnecessary to consider; when, having accommodation, he has received the guest with his goods and thereby has become liable for their safe custody, it would be hard if he was not to have a lien upon them. And, under such circumstances, the lien must be held to extend to goods which he might possibly have refused to receive. In *Turrill v. Crawley*, 13 Q. B. 197; 18 L. J. (Q. B.) 155, the case which was most relied upon for the narrower view, Coleridge, J., says, we must give effect to the changing usages of society, and in noticing the distinction attempted between carriages and horses, he says the fact that most of the decisions are with respect to horses is "obviously explainable by reference to the mode of travelling in former

times. New usages have grown up; and, as carriages are commonly used in travelling, the innkeeper's duties and privileges are extended to them." That, therefore, is no authority against the defendant; and the decision was that though the guest was not the true owner of the carriage, that made no difference if the innkeeper did not know it. In *Broadwood v. Granara*, 10 Ex. 417; 24 L. J. (Ex.) 1, the innkeeper knew that the piano did not belong to the guest, and did not receive it as part of the guest's goods; and on that ground alone the innkeeper was held not entitled to a lien; although there are some *dicta*, not necessary to the decision, to the effect that the innkeeper was not bound to receive the piano. Possibly not, though the liability may well be extended according to the extended usages of society; but, whether the defendant was bound to receive the piano or not, he did receive it as the goods of the guest, and so became liable for it, and therefore must be entitled to his lien. The rule must, therefore, be discharged.

LUSH, J. I am of the same opinion. The innkeeper's lien is not restricted to such things as a travelling guest brings with him in journeying; the contrary has been laid down long ago. It extends to all goods which the guest brings with him, and the innkeeper receives as his. This is laid down in *Calye's Case*, 8 Rep. 32 a, at least as to the innkeeper's liability, and his lien must be co-extensive. If he has this lien as against the guest, the cases have established beyond all doubt that he has the same right as against the real owner of the article, if it has been brought to the inn by the guest as owner.

QUAIN, J. I am of the same opinion. There is no authority for the proposition that the lien of the innkeeper only extends to goods which a traveller may be ordinarily expected to bring with him. In the fifth resolution in *Calye's Case*, 8 Rep. at f. 33 a, the expression in the writ of *bona et catalla* is shown to be extended by the subsequent words, *ita quod hospitibus damnum non eviniat*; and although the words *bona et catalla* "do not of their proper nature extend to charters and evidences, &c., or obligations, or other deeds or specialities, being things in action, yet in this case it is expounded by the latter words to extend to them; for by them [that is, the loss of them] great damages happen to the guest; and therefore if one brings a bag or chest, &c., of evidences into the inn, or obligations, deeds, or other specialities, and by default of the innkeeper they are taken away, the innkeeper shall answer for them." A chest of deeds is certainly not ordinary traveller's luggage, and there is, therefore, no pretence for saying that there is any rule which confines the liability of the innkeeper to such articles; and certainly we ought not to confine his correlative lien within narrower limits. The liability, as shown by the old cases, extends to all things brought to the inn as the property of the guest and so received, even a chest of charters, or obligations; and why not a pianoforte? If, therefore, the innkeeper be liable for the loss, it seems to follow that he must also have a lien upon them. And

if he has a lien upon them as against the guest, the two cases cited (and there are more) show that if the thing be brought by the guest as owner, and the landlord takes it in thinking it is the guest's own, he has the same rights against the stranger, the real owner, as against the guest.

*Rule discharged.*¹

ROBINS & CO. v. GRAY.

QUEEN'S BENCH DIVISION. 1895.

[*Reported 2 Q. B. 501.*]

APPEAL from the judgment of Wills, J. in an action tried without a jury.

The action was brought to recover from the defendant, an innkeeper, certain sewing-machines, the property of the plaintiffs, which they alleged were wrongfully detained by the defendant.

The plaintiffs were a firm of dealers in sewing-machines and other articles. In 1894 they had in their employment as a commercial traveller one Green, who canvassed for orders and sold their goods upon commission. In April, 1894, Green, for the purposes of his business as such commercial traveller, went to stay at the defendant's hotel, taking with him sewing-machines, the property of his employers, for the purpose of selling them to customers in the neighborhood. He remained there until the end of July. Whilst there the plaintiffs sent to him from time to time more sewing-machines for the same purpose. At the end of July Green left the hotel without paying his bill for board and lodging, and he left there some of the machines so sent. Before the defendant received into his hotel the machines so sent, and before Green had incurred his debt for board and lodging, the defendant had been expressly told by the plaintiffs that the machines were their property, and not the property of Green; but he received the goods into his hotel as Green's baggage. The defendant claimed a lien for the amount of Green's debt upon the machines left by him at the hotel.

On the above facts the learned judge gave judgment for the defendant. The plaintiffs appealed.

Arthur Powell and *Guy Granet*, for the appellants. An innkeeper's lien attaches only in respect of goods which he receives into his inn in his character of an innkeeper, and as the goods of the guest who brings them, or, perhaps, to whom they are sent: *Smith v. Dearlove*, 6 C. B. 132. Where the innkeeper has notice that the goods so brought or sent are not the property of the guest but of some other person, and therefore does not receive them as the goods of the guest, he has no lien. His right of lien depends upon whether he is bound to receive the goods into his inn and to keep them safely as his guest's

¹ Affirmed, Ex. Ch., L. R. 10 Q. B. 210. *Cook v. Kane*, 13 Oreg. 482, accord. — Ed.

goods, and he is not bound to do either of those things if, to his knowledge, the goods are not the goods of the guest. The sewing-machines in question here were not the guest's personal luggage, but merchandise sent by the plaintiffs for a temporary purpose, namely, to be kept by the guest until they could be sold in the neighborhood. They were, therefore, like the piano hired by a guest staying at an inn in *Broadwood v. Granara*, 10 Ex. 417, in which case it was held that the innkeeper, who knew the circumstances under which the piano was brought into the inn, had not a lien. In all the cases the question of the innkeeper's knowledge with respect to the property in the goods has been treated as material. In *Johnson v. Hill*, 3 Stark. 172, Abbott, C. J., and in *Turrill v. Crawley*, 13 Q. B. 197, Coleridge, J., left that question to the jury. In *Threfall v. Borwick*, L. R. 10 Q. B. 210, the innkeeper believed that the piano which the guest had hired from the plaintiff was the guest's own property; and in *Mulliner v. Florence*, 3 Q. B. D. 484, the goods were received by the innkeeper as part of the guest's own property. In *Gordon v. Silber*, 25 Q. B. D. 491, Lopes, L. J. in his judgment treated as material the fact that the innkeeper knew of no distinction between the goods of the husband and those which were the separate property of the wife, both having brought goods to the inn. *Robinson v. Walter*, 3 Bulstr. 269, is not in point, because the decision only was that an innkeeper had a lien upon the horse of a stranger for the keep of the horse — not for the debt of the person who brought it to the inn.

W. E. Hume Williams, for the respondent, was not called upon to argue.

LORD ESHER, M. R. I have no doubt about this case. I protest against being asked, upon some new discovery as to the law of innkeeper's lien, to disturb a well-known and very large business carried on in this country for centuries. The duties, liabilities, and rights of innkeepers with respect to goods brought to inns by guests are founded, not upon bailment, or pledge, or contract, but upon the custom of the realm with regard to innkeepers. Their rights and liabilities are dependent upon that, and that alone; they do not come under any other head of law. What is the liability of an innkeeper in this respect? If a traveller comes to an inn with goods which are his luggage — I do not say his personal luggage, but his luggage — the innkeeper by the law of the land is bound to take him and his luggage in. The innkeeper cannot discriminate and say that he will take in the traveller but not his luggage. If the traveller brought something exceptional which is not luggage — such as a tiger or a package of dynamite — the innkeeper might refuse to take it in; but the custom of the realm is that, unless there is some reason to the contrary in the exceptional character of the things brought, he must take in the traveller and his goods. He has not to inquire whether the goods are the property of the person who brings them or of some other person. If he does so inquire, the traveller may refuse to tell him, and may say, "What

business is that of yours? I bring the goods here as my luggage, and I insist upon your taking them in"; or he may say, "They are not my property, but I bring them here as my luggage, and I insist upon your taking them in"; and then the innkeeper is bound by law to take them in. Again, suppose the things brought are such things as the innkeeper is not bound to take in, he may, as I have said, refuse to take them in although the traveller demands that they shall be taken in as his luggage; but if after that the innkeeper changes his mind and does take them in, then they are in the same position as goods properly offered to the innkeeper according to the custom of the realm. Then the innkeeper's liability is not that of a bailee or pledgee of goods; he is bound to keep them safely. It signifies not, so far as that obligation is concerned, if they are stolen by burglars, or by the servants of the inn, or by another guest; he is liable for not keeping them safely unless they are lost by the fault of the traveller himself. That is a tremendous liability: it is a liability fixed upon the innkeeper by the fact that he has taken the goods in; and by law he has a lien upon them for the expense of keeping them as well as for the cost of the food and entertainment of the traveller. By law that lien can be enforced, not only against the person who has brought the goods into the inn, but against the real and true owner of them. That has been the law for two or three hundred years; but to-day some expressions used by judges, and some questions—immaterial, as it seems to me—which have been left to juries, are relied on to establish that if the innkeeper knows that the goods are not the goods of the person who brings them to the inn, he may refuse to take them in; or, if he does take them in, he has no lien upon them. One cannot help asking, What is his liability supposed to be if he does take in goods under such circumstances? It must be borne in mind that goods brought into an inn are not exclusively in the possession of the innkeeper; the person who brings them may deal with them: he may take them out of a box in a room or passage without the knowledge of the innkeeper, though the latter is bound to see that no one else interferes with them. Now, is there any decided case in which it has been held that, although goods have been brought to an inn as the luggage of the traveller and received as such by the innkeeper, he has no lien upon them if he knows that they are not the goods of the traveller? There is not one such case to be found in the books. It was said that *Broadwood v. Granara*, 10 Ex. 417, was such a case. But there the proposition, that if a guest brings goods into an inn as his luggage they must be treated as if they were his goods, was fully recognized. The judges held in that case that a piano, not brought to the inn by the guest as his luggage, but sent in by a tradesman for the guest to play upon during his stay at the inn, was not offered to, nor taken possession of by, the innkeeper under the custom of the realm as the luggage of the guest, and therefore that the piano was not subject to the innkeeper's lien. Whether we should have agreed with that decision is immate-

rial. The case was expressly decided on the ground that the law of innkeepers did not apply. It is, therefore, no authority in the case now before us, where, as the learned judge in the Court below has found, the goods were brought to the inn as the goods of the traveller and accepted as his goods by the innkeeper. If we were to accede to the argument for the appellants we should be making a new law, and our decision would produce in very many cases great confusion and hardship. I am of opinion that an innkeeper is bound to take in goods with which a person who comes to the inn is travelling as his goods, unless they are of an exceptional character; that the innkeeper's lien attaches, and that the question of whose property the goods are, or of the innkeeper's knowledge as to whose property they are, is immaterial. This appeal should, therefore, be dismissed.

KAY, L. J. In this case the appellants bring their action for the detention of certain sewing-machines of which they are the owners. The defence is, "I am an innkeeper; the goods in question came into my possession as the goods of a guest at my inn, and I have a lien upon them for the unpaid bill of that guest." Replication, "You knew that they were not his goods; you had notice that they did not belong to him, but that they belonged to us, the plaintiffs." The question is, whether that is a good replication. The facts are: The appellants' traveller went to the inn taking some sewing-machines with him, and stayed there. Whilst there other machines were sent to him by his employers, and those machines were received by the innkeeper, and were taken care of by him, and were in his possession. The traveller left without paying his bill for board and lodging at the inn. I agree with Wills, J. that the fact that some of the machines were sent to the inn after the traveller had gone there does not make any difference; because the innkeeper accepted them as he had accepted the machines originally brought to the inn by the traveller — that is, as the goods of the traveller — I do not mean his property, because the innkeeper knew that they were the property, not of the traveller, but of his employers. Now, we have had an elaborate argument, and various cases have been cited in support of the appellants' case. We asked counsel if he knew of a single case in which it had been held that an innkeeper could refuse to take in goods of an ordinary description brought to his inn by a commercial traveller for sale in the neighborhood. No case of that kind has been cited or could be found, although this business of commercial travellers has been carried on for a very great length of time, and so largely that there is scarcely an inn in England to which commercial travellers do not go with the goods of their employers. That fact is suggestive in considering the contention now put forward. Further, there is no case to be found in the books to show that an innkeeper would not be liable in the ordinary way for the loss of such goods so brought to his inn by a commercial traveller, and so taken in by himself. It is, therefore, clear that, if a commercial traveller goes to an inn with goods as his luggage which are the ordi-

nary goods for sale of a commercial traveller, and the innkeeper takes him and his goods in, the innkeeper's liability in respect of those goods would be the same as in respect of the personal luggage of the traveller. That being undoubted, we have to consider whether the innkeeper's lien is defeated by reason of the fact that when he took the goods in he knew, or had had notice, that they were the property, not of the commercial traveller, but of his employers. The law is stated in *Robinson v. Walter*, 3 Bulstr. 269, by Dodderidge, J., when the case first came before him, thus: "This is a common inn, and the defendant a common innkeeper, and this his retainer here is grounded upon the general custom of the land: He is to receive all guests and horses that come to his inn: He is not bound to examine who is the true owner of the horse brought to his inn; he is bound, as he is an innkeeper, to receive them, and therefore there is very great reason for him to retain him, until he be satisfied for his meat which he hath eaten; and that the true owner of the horse cannot have him away, until he have satisfied the innkeeper for his meat." That is a distinct statement that this law of an innkeeper's lien is founded on the general custom of the land, and that an innkeeper is not bound to inquire to whom the goods which a guest brings to the inn belong, but is bound to receive them.

The case of *Broadwood v. Granara*, 10 Ex. 417, was chiefly relied on for the appellants. There a guest staying at an inn went to a shopkeeper in the town and hired a piano, which was sent to him at the inn for the purpose of playing on it during his stay there, and the innkeeper knew that the piano was so hired for that purpose, and allowed it to be brought into his inn. The Court held that he had no lien upon it; but the ground of the decision is stated as clearly as possible in the judgments. Pollock, C. B. said (at p. 422): "This is the case of goods, not brought to the inn by a traveller *as his goods*, either upon his coming to or whilst staying at the inn, but they are goods furnished for his temporary use by a third person, and known by the innkeeper to belong to that third person. I shall not inquire whether, if the pianoforte had belonged to the guest, the defendant would have had a lien on it. It is not necessary to decide that point, for the case finds that it was known to the defendant that the pianoforte was not the property of the guest, and that it was sent to him for a special purpose. Under these circumstances, I am clearly of opinion that the defendant has no lien. Parke, B. (at p. 423) said: "It is not necessary to advert to the decisions on the subject of an innkeeper's lien, because this is not the case of *goods brought by a guest to an inn* in that sense in which the innkeeper has a lien upon them; but it is the case of goods sent to the guest for a particular purpose, and known by the innkeeper to be the property of another person. It therefore seems to me that there is no pretence for saying that the defendant has any lien." Then follow words which are sufficient to determine the case before us: "The principle on which an innkeeper's lien depends is, that he is bound to receive travellers and the goods which they bring with them

to the inn. Then, inasmuch as the effect of such lien is to give him a right to keep the goods of one person for the debt of another, the lien cannot be claimed except in respect of goods which, in performance of his duty to the public, he is bound to receive." An analogous case to that was put by the Master of the Rolls during the argument of the present case. Suppose a jeweller in the town sent, with the knowledge of the innkeeper, certain jewels to a guest at the inn on approval, and allowed them to remain in the inn for some days — could the innkeeper claim and enforce a lien upon those jewels? I should think he could not, because they were sent for a special temporary purpose, and the innkeeper knew it; they were, therefore, not sent as the goods — I do not mean as the property — of the guest; they were not goods which he was likely to take about with him as his luggage. But, in the case before us, the goods were received into the inn as the kind of goods with which the guest was accustomed to travel in his employment as a commercial traveller; and they were the kind of goods which the innkeeper would be bound to receive without inquiring — and he had no right to inquire — to whom they belonged. If we were to hold that the innkeeper had no lien upon them we should be effecting a complete revolution in the custom of the land, in accordance with which an innkeeper, who receives into his inn commercial travellers with the goods of their employers which the travellers bring there in the course of their business, is accustomed to believe, and has a right to believe, that he has a lien upon those goods.¹

 ROBINSON v. BAKER.

SUPREME COURT OF MASSACHUSETTS. 1849.

[Reported 5 Cush. 137.]

FLETCHER, J. [After stating the facts, the instructions requested, and the instructions given.] As the ruling of the judge, that the defendant, as a carrier, had a lien for his freight, was placed upon grounds wholly independent of any rightful authority in the agents of the Old Clinton line and the Albany and Canal line, to divert the goods from the course in which the plaintiff had directed them to be sent, and to forward them by the defendant's vessel, and wholly independent of the plaintiff's consent, express or implied, the simple question raised in the case is, whether if a common-carrier honestly and fairly on his part, without any knowledge or suspicion of any wrong, receives goods from a wrongdoer, without the consent of the owner, express or implied, he may detain them against the true owner, until his freight or hire for carriage is paid; or to state the question in other

¹ But see *Covington v. Newberger*, 99 N. C. 523. — Ed.

words, whether if goods are stolen and delivered to a common-carrier, who receives them honestly and fairly in entire ignorance of the theft, he can detain them against the true owner, until the carriage is paid.

It is certainly remarkable, that there is so little to be found in the books of the law, upon a question which would seem likely to be constantly occurring in the ancient and extensive business of the carrier. In the case of *York v. Grenaugh*, 2 Ld. Ray. 866, the decision was, that if a horse is put at the stable of an inn by a guest, the innkeeper has a lien on the animal for his keep, whether the animal is the property of the guest or of some third party from whom it has been fraudulently taken or stolen. In that case, Lord Chief Justice Holt cited the case of an Exeter common-carrier where one stole goods and delivered them to the Exeter carrier, to be carried to Exeter; the right owner, finding the goods in possession of the carrier, demanded them of him; upon which the carrier refused to deliver them unless he was first paid for the carriage. The owner brought trover, and it was held, that the carrier might justify detaining the goods against the right owner for the carriage; for when they were brought to him, he was obliged to receive them, and carry them, and therefore since the law compelled him to carry them, it will give him a remedy for the premium due for the carriage. Powell, J., denied the authority of the case of the Exeter carrier, but concurred in the decision as to the innkeeper. There is no other report of the case of the Exeter carrier to be found. Upon the authority of this statement of the case of the Exeter carrier, the law is laid down in some of the elementary treatises to be, that a carrier, who receives goods from a wrongdoer or thief, may detain them against the true owner until the carriage is paid.

In the case of *King v. Richards*, 6 Whart. 418, the court, in giving an opinion upon another and entirely different and distinct point, incidentally recognized the doctrine of the case of the Exeter carrier. But until within six or seven years there was no direct adjudication upon this question except that referred to in *York v. Grenaugh* of the Exeter carrier. In 1843, there was a direct adjudication, upon the question now under consideration, in the supreme court of Michigan, in the case of *Fitch v. Newberry*, 1 Doug. 1. The circumstances of that case were very similar to those in the present case. There the goods were diverted from the course authorized by the owner, and came to the hands of the carrier without the consent of the owner, express or implied; the carrier however was wholly ignorant of that, and supposed they were rightfully delivered to him; and he claimed the right to detain them until paid for the carriage. The owner refused to pay the freight, and brought an action of replevin for the goods. The decision was against the carrier. The general principle settled was, that if a common-carrier obtain possession of goods wrongfully or without the consent of the owner, express or implied, and on demand refuse to deliver them to the owner, such owner may bring replevin for the goods or trover for their value. The case

appears to have been very fully considered and the decision is supported by strong reasoning and a very elaborate examination of authorities. A very obvious distinction was supposed to exist between the cases of carriers and innkeepers, though the distinction did not affect the determination of the case.

This decision is supported by the case of *Buskirk v. Purin*, 2 Hall, 561. There property was sold on a condition, which the buyer failed to comply with, and shipped the goods on board the defendant's vessel. On the defendant's refusal to deliver the goods to the owner, he brought trover and was allowed to recover the value, although the defendants insisted on their right of lien for the freight.

Thus the case stands upon direct and express authorities. How does it stand upon general principles? In the case of *Saltus v. Everett*, 20 Wend. 267, 275, it is said: "The universal and fundamental principle of our law of personal property is, that no man can be divested of his property without his consent, and consequently that even the honest purchaser under a defective title cannot hold against the true proprietor." There is no case to be found, or any reason or analogy anywhere suggested, in the books, which would go to show that the real owner was concluded by a bill of lading not given by himself but by some third person, erroneously or fraudulently. If the owner loses his property, or is robbed of it, or it is sold or pledged without his consent, by one who has only a temporary right to its use by hiring or otherwise, or a qualified possession of it for a specific purpose, as for transportation, or for work to be done upon it, the owner can follow and reclaim it in the possession of any person, however innocent.

Upon this settled and universal principle, that no man's property can be taken from him without his consent, express or implied, the books are full of cases, many of them hard and distressing cases, where honest and innocent persons have purchased goods of others apparently the owners, and often with strong evidence of ownership, but who yet were not the owners, and the purchasers have been obliged to surrender the goods to the true owners, though wholly without remedy for the money paid. There are other hard and distressing cases of advances made honestly and fairly by auctioneers and commission merchants, upon a pledge of goods by persons apparently having the right to pledge, but who in fact had not any such right, and the pledgees have been subjected to the loss of them by the claim of the rightful owner. These are hazards to which persons in business are continually exposed by the operation of this universal principle, that a man's property cannot be taken from him, without his consent. Why should the carrier be exempt from the operation of this universal principle? Why should not the principle of *caveat emptor* apply to him? The reason, and the only reason, given is, that he is obliged to receive goods to carry, and should therefore have a right to detain the goods for his pay. But he is not bound to receive goods from a wrong-

doer. He is bound only to receive goods from one who may rightfully deliver them to him, and he can look to the title, as well as persons in other pursuits and situations in life. Nor is a carrier bound to receive goods, unless the freight or pay for the carriage is first paid to him; and he may in all cases secure the payment of the carriage in advance. In the case of *King v. Richards*, 6 Whart. 418, it was decided that a carrier may defend himself from a claim for goods by the person who delivered them to him, on the ground that the bailor was not the true owner, and therefore not entitled to the goods.

The common-carrier is responsible for the wrong delivery of goods, though innocently done, upon a forged order. Why should not his obligation to receive goods exempt him from the necessity of determining the right of the person to whom he delivers the goods, as well as from the necessity of determining the right of the person from whom he receives goods? Upon the whole, the court are satisfied, that upon the adjudged cases, as well as on general principles, the ruling in this case cannot be sustained, and that if a carrier receives goods, though innocently, from a wrongdoer, without the consent of the owner, express or implied, he cannot detain them against the true owner, until the freight or carriage is paid.¹

GILSON v. GWINN.

SUPREME COURT OF MASSACHUSETTS. 1871.

[Reported 107 Mass. 126.]

TORT for the conversion of a sewing machine. At the trial in the superior court before *Reed, J.*, the plaintiff introduced evidence tending to show that, being the owner of the machine, he let it to Betsey Bunton for a dollar a week, payable in advance; that she paid for some weeks, but afterwards stopped payment; that some time after she stopped payment she moved from Springfield Street in Boston, where she had been living, to Myrtle Street, and employed the defendant, who was licensed to remove furniture from place to place in Boston, to remove her furniture, including the machine, to Myrtle Street; that she neglected to pay the defendant, who thereupon retained the machine, claiming a lien thereon for his services; that the plaintiff,

¹ *Clark v. Lowell & Lawrence R. R. Co.*, 9 Gray, 231; *Jones v. Boston & Albany R. R. Co.*, 63 Me. 188; *Fitch v. Newberry*, 1 Douglass (Mich.), 1, accord. Contra, *semble*, *Waugh v. Denham*, 16 Ir. C. L. 405; *King v. Richards*, 6 Whart. 418. When a first carrier has delivered goods to a second carrier against the shipper's orders, the second carrier is often given a lien, on the ground that the first carrier was the shipper's agent. *Patten v. U. P. Ry. Co.*, 29 Fed. R. 590; *Briggs v. Boston & Lowell R. R. Co.*, 6 Allen, 246; *Vaughan v. Providence & W. R. R. Co.*, 13 R. I. 578. See *Denver & R. G. Ry. Co. v. Hill*, 13 Colo. 35. — ED.

having subsequently gone to Springfield Street and ascertained that the lessee had moved to Myrtle Street, called on her there and learned that the defendant had the machine; and that he then saw the defendant, and desired him to accept a deposit of other goods of the lessee in place of the machine, but the defendant refused, and he then demanded the machine.

The defendant offered no evidence, and the judge ruled that he had no lien. The jury returned a verdict for the plaintiff, and the judge reported the case for the consideration of this court; if the ruling was correct, the verdict to stand; if on the facts reported the defendant had a lien on the machine, then judgment to be for the defendant.

C. H. Hudson, for the defendant.

J. F. Wilson, for the plaintiff, was stopped by the court.

WELLS, J. The lessee of the sewing machine had a right of possession until demand of return by the owner; but she had no right of property which she could transfer, and no authority by which she could confer any right of property upon another. She could not, therefore, give the defendant a lien upon the property for its carriage for her convenience and at her request alone.

The defendant not having a lien upon the property as against the owner, his possession became wrongful when he refused to surrender it to the plaintiff on demand therefor.

Judgment on the verdict for the plaintiff.¹

SINGER MANUFACTURING CO. v. LONDON & SOUTH WESTERN RAILWAY CO.

QUEEN'S BENCH. 1894.

[*Reported 1 Q. B. Div. 833.*]

APPEAL from the decision of the judge of the Southwark County Court.

The plaintiffs by an agreement let to one Woodman a sewing machine, Woodman undertaking to pay to them a rent of 1s. 6d. per week payable weekly in advance, and it was agreed that at any time during the hire Woodman might become the purchaser of the machine by payment of the price, and that in such case credit should be given

¹ As to the power of the mortgagor of chattels to create a lien on them against the mortgagee, see *Case v. Allen*, 21 Kan. 217; *Small v. Robinson*, 69 Me. 425; *Hammond v. Danielson*, 126 Mass. 294; *Storms v. Smith*, 137 Mass. 201; *Howes v. Newcomb*, 146 Mass. 76; *Lynde v. Parker*, 155 Mass. 481; *Sargent v. Usher*, 55 N. H. 287; *Wright v. Sherman*, 3 S. D. 290.

As to the power of an officer who seizes chattels on legal process, to create a lien on them against their owner, see *Binns v. Pigot*, 9 C. & P. 208; *J. I. Case Plow Works v. Union Iron Works*, 56 Mo. Ap. 1. — ED.

for all payments previously made under the agreement. Unless and until a purchase was effected, the machine was to continue the sole property of the plaintiffs, and Woodman was to remain bailee only of it.

In May, 1893, Woodman deposited the sewing machine in the cloak room belonging to the defendants at Waterloo Station, and received a ticket on which was printed among other conditions, "Articles deposited in the cloak rooms for more than 48 hours will be charged 1*d.* extra for each package per diem for the first calendar month, and 2*d.* per week or part of a week for the second and third calendar months. . . . Articles left in the cloak rooms for twelve months are liable to be sold, and the company will not hold itself responsible to account for the proceeds."

Woodman subsequently made default in the payment of the weekly rent, and in October, 1893, he forwarded the cloak-room ticket to the plaintiffs. The defendants refused to deliver the sewing machine to the plaintiffs until they were paid 4*s.*, which was admitted to be the amount of their charges in accordance with the condition indorsed on the cloak-room ticket. The plaintiffs then brought this action to recover the machine, and the defendants counter-claimed for the 4*s.*

The county court judge held that the defendants had a lien on the sewing machine in respect of these charges, and gave judgment for them on claim and counter-claim. He, however, gave leave to appeal, and the plaintiffs appealed.

Cluer and *W. Russell*, for the plaintiffs. The depositary of chattels has no right of lien as against the true owner. The only exceptions to this rule are in the cases of innkeepers, who have a lien on all goods left with them in that character, and of carriers, who have a lien on all goods entrusted to them for carriage. It is not suggested that this sewing machine was entrusted to the defendants as common carriers. No doubt as against the depositor the defendants would be entitled to retain the machine until these charges for warehousing were paid; but it cannot be contended that the plaintiffs gave him authority to deposit the machine with the defendants so as to make them responsible to the defendants for these warehouse charges. It is clear, therefore, that the counter-claim cannot be sustained, and consequently, since the defendants have no right to recover these warehouse charges from the plaintiffs, they have no lien for those charges as against them: *Castellain v. Thompson*, 13 C. B. N. s. 105; *Hiscox v. Greenwood*, 4 Esp. 174; *Hollis v. Claridge*, 4 Taunt. 807.

Acland, for the defendants. It is admitted that the counter-claim cannot be sustained since no express authority to the depositor from the plaintiffs can be shown, and it must, therefore, be treated as withdrawn. The defendants, however, have a lien on the machine for the payment of these charges. They received it as warehousemen, not as carriers, and as such they have a lien upon it: *Rex v. Humphery*, M'Cl. & Y. 173; *Moet v. Pickering*, 8 Ch. D. 372. The principle on which innkeepers and carriers have a lien on goods entrusted to them

for their charges as against all the world is that they are bound to receive such goods for storage or carriage respectively: *Naylor v. Mangles*, 1 Esp. 109. The defendants are also bound to provide cloak rooms at railway stations, and to receive goods into them, and, therefore, the same principle applies. By § 2 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), every railway company shall according to its powers afford all reasonable facilities for the receiving and forwarding and delivering of traffic on their railway. Traffic is defined by § 1 to include passengers and their luggage and goods, and a cloak room for the reception of the luggage and goods of passengers is such a reasonable facility as a railway company are bound to supply: *South Eastern Railway Co. v. Railway Commissioners*, 6 Q. B. D. 586. The right of warehousemen to a lien for their charges was recognized in *De Rothschild v. Morrison, Kekewich & Co.*, 24 Q. B. D. 750, which shows that if the defendants in this case had interpleaded they would have been entitled to these charges.

Chuer, in reply. *De Rothschild v. Morrison, Kekewich & Co.*, 24 Q. B. D. 750, was a decision on Order LVII., r. 15, and did not refer to the question of lien. The lien of carriers and innkeepers is not dependent on their obligation to receive goods: *Threfall v. Borwick*, Law Rep. 10 Q. B. 210.

MATHEW, J. I think that this appeal must be dismissed.

The material facts are these. One Woodman, the hirer of a sewing machine, deposited it at the cloak room belonging to the defendants at Waterloo Station. The charges for which the defendants now claim a lien on the machine were incurred in respect of the deposit of the article there. The hirer, it would appear, after a time made up his mind not to release the article, and gave notice to the owners where it was. It was held by Woodman under a hire-purchase agreement, and, at the time this notice was given, a considerable amount of instalments remained unpaid. Thereupon the plaintiffs demanded the possession of the sewing machine from the defendants, and the defendants claimed a lien upon it for their charges for the time during which the article had remained in their cloak room. Now, it could not be disputed that the hirer was entitled, while he was in possession of this article, to carry it by train and to incur such charges in respect of it as a passenger by train does incur. Whatever the origin of the rule, it is not necessary to discuss now; but it is clear law that a carrier would have on the article so carried a lien for the charges incurred in respect of its carriage. The sole question now is whether the same principle applies to the charges incurred in respect of its safe custody in the cloak room.

The history of the cloak room at railway stations is supplied by the Railway and Canal Traffic Act, 1854. There it is enacted that a railway company shall afford reasonable facilities for receiving, forwarding, and delivering traffic. One of the most reasonable of such facilities is the cloak room at railway stations, which has been long established in accordance with that Act of Parliament. The cloak

room at Waterloo Station existed under that Act of Parliament, and it is said the principle that applies to the contract of carriage applies to this cloak room, which is provided by the company as part of the reasonable facilities for the traffic on the line. It seems to me that that argument is a sound one, and that the same principle applies. The lien which the defendants had as carriers they had also as owners of the cloak room, and they were entitled, in my opinion, to have payment of their charges in respect of the machine before delivery to the plaintiffs.

That was the opinion of the county court judge. I see no reason to differ from it, and the appeal must be dismissed.

COLLINS, J. I am of the same opinion. I think the sewing machine in this case must be taken to be deposited in the cloak room just in the same way and subject to the same rights as if it were entrusted to a carrier for the purpose of carriage. I think, that having regard to modern decisions and the rising standard of convenience to which railway companies are obliged to conform, the cloak room is now to be regarded simply as one of the necessary and reasonable facilities incident to the carriage of passengers and their baggage. The company are common carriers of passengers' luggage, and if they carried this sewing machine they would be common carriers of this sewing machine, and would have a lien upon it against all the world in respect of the cost of carrying it. I do not see why they should not equally have a lien for receiving it and warehousing it in their cloak room. The same principle lies at the root of both. They are under an obligation now to give reasonable facilities for the receipt and safe custody of baggage, and it was in the performance of that obligation that they received this sewing machine. Therefore, on that ground it seems to me the lien is good, not only against the person depositing it, but against the owner. I think in this case the lien may also be rested on another ground; and that is, that the person who deposited this machine was, as between himself and the owner of it, entitled to the possession of it at the time he deposited it. He was entitled to it under a contract of hire, which gave him the right to use it, I presume, for all reasonable purposes incident to such a contract, and among them, I take it, he acquired the right to take the machine with him if he travelled, and to deposit it in a cloak room if he required to do so. In the course of that reasonable user of the machine, and before the contract of bailment was determined, he gave rights to the railway company in respect of the custody of it. I think those rights must be good against the owners of the machine, who had not determined the hire-purchase agreement at the time that those rights were acquired by the railway company. If the owners subsequently determined that agreement, they must determine it subject to the rights which had been acquired, that is, subject to the lien of the defendants for their charges.

I think, therefore, that on both those grounds the judgment of the county court judge is right, and the appeal ought to be dismissed.

Appeal dismissed; leave to appeal given.

C. *Loss of Lien.*

JONES v. PEARLE.

KING'S BENCH. 1723.

[*Reported 1 Stra. 557.*]

IN trover for three horses, the defendant pleaded, that he kept a public inn at Glastenbury, and that the plaintiff was a carrier and used to set up his horses there, and £36 being due to him for the keeping the horses, which was more than they were worth, he detained and sold them, *prout ei bene licuit*: and on demurrer judgment was given for the plaintiff, an innkeeper having no power to sell horses, except within the city of London. 2 Roll. Abr. 85; 1 Vent. 71; Mo. 876; Yel. 67. And besides, when the horses had been once out, the power of detaining them for what was due before did not subsist at their coming in again. *Wilkins v. Carmichael*, Doug. 105; Co. Bank. Laws, 516, 3 ed.

M'COMBIE v. DAVIES.

KING'S BENCH. 1805.

[*Reported 7 East, 5.*]

THIS action of trover for tobacco having gone to a second trial, in consequence of the opinion of the court delivered in Trinity term last, 6 East, 538, when it was considered that the defendant's taking an assignment of the tobacco in the King's warehouse by way of pledge from one Coddan, a broker, who had purchased it there in his own name for his principal, the plaintiff (after which assignment the tobacco stood in the defendant's name in the warehouse, and could only be taken out by his authority), and the defendant's refusing to deliver it to the plaintiff after notice and demand by him, amounted to a conversion. The defence set up at the second trial was, that the plaintiff being indebted to Coddan his broker in £30 on the balance of his account; and he having a lien upon the tobacco to that amount while it continued in his name and possession, the defendant who claimed by assignment from Coddan for a valuable consideration stood in his place and was entitled to retain the tobacco for that sum; and therefore that the plaintiff not having tendered this £30 ought to be nonsuited. *Lord Ellenborough*, C. J., however, being of opinion that the lien was personal, and could not be transferred by the tortious act of the broker pledging the goods of his principal, the plaintiff recovered a verdict for the value of the tobacco.

The Solicitor-General now moved to set aside the verdict, and either to enter a nonsuit or have a new trial; upon the ground that the defendant who stood in the place of Coddan, and was entitled to avail himself of all the rights which Coddan had against his principal, could not have the goods taken out of his hands by the principal without receiving the amount of Coddan's claim upon them. And in answer to the case of *Daubigny v. Duval*, 5 Term Rep. 604 (which was suggested as establishing a contrary doctrine), he observed that Lord Kenyon was of opinion at the trial, that the principal could not recover his goods from the pawnee, to whom they had been pledged by the factor, without tendering to the pawnee the sum advanced by him, which was within the amount of the factor's lien upon the goods for his general balance; and that his Lordship seemed to retain that opinion when the case was moved in court, though the rest of the bench differed from him. But —

LORD ELLENBOROUGH, C. J., said, that nothing could be clearer than that liens were personal,¹ and could not be transferred to third persons by any tortious pledge of the principal's goods. That whether or not a lien might follow goods in the hands of a third person to whom it was delivered over by the party having the lien, purporting to transfer his right of lien to the other, as his servant, and in his name, and as a continuance in effect of his own possession;² yet it was quite clear that a lien could not be transferred by the tortious act of a broker pledging the goods of his principal, which he had no authority to do. That in *Daubigny v. Duval*, though Lord Kenyon was at first of opinion that there ought to have been a tender to the pawnee of the sum for which the goods had been pledged by the factor, within the extent of his lien, in order to entitle the plaintiff to recover; yet after the rest of the court had expressed a different opinion, on which he at that time only stated his doubts, he appears in the subsequent case of *Sweet and another, Assignees of Gard v. Pym*, 1 East, 4, to have fully acceded to their opinion; for he there states that "the right of lien has never been carried further than while the goods continue in the possession of the party claiming it." And afterwards he says, "In the case of *Kinloch v. Craig*, 3 Term Rep. 119, afterwards in Dom. Proc. ib. 786, where I had the misfortune to differ from my brethren, it was strongly insisted that the right of lien extended beyond the time of actual possession; but the contrary was ruled by this court, and afterwards in the House of Lords."

His Lordship then, after consulting with the other judges, declared that the rest of the court coincided with him in opinion, that no lien was transferred by the pledge of the broker in this case; and added, that he would have it fully understood that his observations were ap-

¹ One who has a lien has no interest which can be taken on execution against him. *Legg v. Evans*, 6 M. & W. 36; *Lovett v. Brown*, 40 N. H. 511. Otherwise in case of a pledgee. *In re Rollason*, 34 Ch. D. 495. — ED.

² See *Jaquith v. Am. Exp. Co.*, 60 N. H. 61. — ED.

plied to a tortious transfer of the goods of the principal by the broker undertaking to pledge them as his own; and not to the case of one who, intending to give a security to another to the extent of his lien, delivers over the actual possession of goods, on which he has the lien, to that other, with notice of his lien, and appoints that other as his servant to keep possession of the goods for him; in which case he might preserve the lien.

PER CURIAM,

*Rule refused.*¹

BOARDMAN v. SILL.

NISI PRIUS. 1808.

[*Reported 1 Camp. 410, note.*]

TROVER for some brandy, which lay in the defendant's cellars, and which, when demanded, he had refused to deliver up, saying it was his own property. At this time certain warehouse rent was due to the defendant on account of the brandy, of which no tender had been made to him. The *Attorney-General* contended that the defendant had a lien on the brandy for the warehouse rent, and that till this was tendered, trover would not lie. But *Lord Ellenborough* considered, that as the brandy had been detained on a different ground, and as no demand of warehouse rent had been made, the defendant must be taken to have waived his lien, if he had one, — which would admit of some doubt. The plaintiff had a verdict.²

WHITE v. GAINER.

COMMON PLEAS. 1824.

[*Reported 2 Bing. 23.*]

TROVER for eight pieces of cloth. At the trial before *Park, J.*, Gloucester Lent Assizes, 1824, it appeared that on the 9th of July, 1822, Symes, a clothier, hearing that a bailiff was in his house, went to sleep at the house of the defendant, Gainer (a dyer and miller of cloth), to whom he was considerably indebted for work done in the course of

¹ See Story, Bailm. §§ 325, 326. "In *McCombie v. Davies*, the decision went so far as to hold that a pledge by a factor was so totally tortious as not even to transfer the lien which the pledgor himself had. This decision is made no longer law by the earlier Factors Acts. . . . And by the second section of that Act (4 G. IV. c. 83), the legislature repealed *McCombie v. Davies* in so far as it was applicable to those taking pledges from consignees; but that Act did not alter the established law as to pledging, with regard to others than consignors and consignees." *Cole v. North Western Bank*, L. R. 10 C. P. 354, 364, 367. — ED.

² See *Lord v. Jones*, 24 Me. 439. — ED.

his business. The next day Symes, by way of securing Gainer, sold to him the pieces of cloth in question, together with several others, delivering a bill of parcels bearing date a few days before. On the first of August a commission was issued against Symes, who was declared a bankrupt on the 19th.

In September, the plaintiffs demanded the cloths in question of the defendant, who refused to deliver them up, saying, "He might as well give up every transaction of his life," but making no demand. In a conversation in the March ensuing he said, "The thing might have been settled long ago if the assignees would have allowed him his demand for milling and rowing the eight pieces of cloth." The value of the cloths in dispute was £98 3s., and the defendant's general balance against Symes for milling, dyeing, and rowing cloth, £188 11s. It was contended at the trial that the defendant's lien, as far as he had any, was merged in the purchase of the cloth; and that at all events he had waived it by not making any claim in respect of it when the cloth was demanded. The learned judge directed the jury that the plaintiffs, previously to their demand, ought to have tendered at least the amount of the lien for workmanship on the cloths in dispute; but he reserved the point as to the merger of the lien for the consideration of this court. A verdict having been found for the defendant, on the issue as to these eight pieces of cloth,

Taddy, Serjeant, now moved for a rule *nisi* to set aside this verdict and have a new trial, on the grounds urged at the assizes; and he cited *Boardman v. Sill*, 1 Camp. 410, to show that the defendant had waived his lien, by not specifying and insisting on it at the time the cloths were demanded of him.

BEST, C. J. I agree in the law as laid down in *Boardman v. Sill*, but not in the application of it now proposed. In that case it was holden that if a party, when goods are demanded of him, rests his refusal upon grounds other than that of lien, he cannot afterwards resort to his lien as a justification for retaining them. Therefore if, even in this case, the defendant, when applied to to deliver the goods, had said, "I bought them, they are my property," I should have holden there was a waiver of his lien; but he said no such thing, but only, "if I deliver them, I may as well give up every transaction of my life," Now, his business was that of a miller of cloth, and if he had given up his lien in this instance, he might have been called on to do so always; he therefore refused to deliver them, and it was then for the plaintiffs to consider what offer they should make. It has been urged that he bought them after the bankruptcy. If that were so, he stands in the same situation as every other purchaser under the same circumstances; the purchaser is liable to restore them to the assignees, but the assignees must take them subject to such rights as had accrued previously to their claim, and the bankruptcy of the bailor will not deprive the defendant of the right to which he is entitled, — the right of lien. It might have been otherwise if the defendant, when called on to

surrender the goods, had relied on the purchase; but this was not the case, and the verdict must stand.

PARK, J. If the defendant, on the first conversation, had said anything inconsistent with the claim of lien there might have been some ground for this application; but the transactions of his life were milling and rowing cloth, and those were the transactions which he said he might as well give up, if he gave up this. The subsequent conversation puts the matter out of doubt, when he declared the thing might have been settled, if his demand for milling and rowing the cloth had been allowed; and this clearly shows he never intended to relinquish his lien.

BURROUGH, J. If he had said he purchased the cloth, and that the lien formed part of the price, there might be some ground for the motion. But it is clear the fact was not so. *Rule refused.*

JACOBS v. LATOUR.

COMMON PLEAS. 1828.

[*Reported 5 Bing. 130.*]

TROVER for the conversion of certain race-horses. At the trial before *Burrough, J.*, last Hertford assizes, it appeared that these horses had been placed by Lawton with the defendant Messer, a trainer, and were by him kept and trained for running. Lawton being indebted to Messer for his services in this respect, and for the keep of the horses, and being insolvent, Messer obtained a judgment against him on the 5th of May, 1827, for £227, upon which he issued a *fi. fa.*, on the 16th of the same month, returnable on the 23d. The levy was made on the 16th, and under it the horses in question, which had never been out of his possession, were sold to Messer for £156.

On the 22d of May, 1827, a commission of bankrupt having issued against Lawton, upon an act of bankruptcy committed in February, 1825, the plaintiff, as his assignee, brought this action to recover the value of the before-mentioned horses.

It was contended, on the part of the defendants, that if the execution would not avail against the commission of bankrupt, at all events the defendant Messer had a lien for his services in training the horses, which entitled him to keep them till his account was settled; a verdict, however, was found for the plaintiff, with leave for the defendants to move to set it aside on this ground, and enter a nonsuit instead. Accordingly *Wilde, Serjt.*, obtained a rule *nisi* to this effect, citing *Chase v. Westmore*, 5 M. & S. 180.

Andrews, Serjt., for the plaintiff.

Wilde, for the defendant.

BEST, C. J. This was an action of trover against a stable keeper and trainer, to recover the value of certain horses placed with him for the purpose of being trained. The first question in the cause is, Whether the defendant had any lien on the horses; and the second, Whether, if he had a lien, it was destroyed by his taking the horses in execution.

It is not necessary for us to enter on the first question, because we are of opinion that if he had any lien, it was destroyed by the execution at his suit.

A lien is destroyed if the party entitled to it gives up his right to the possession of the goods. If another person had sued out execution, the defendant might have insisted on his lien. But Messer himself called on the sheriff to sell; he set up no lien against the sale; on the contrary, he thought his best title was by virtue of that sale. Now, in order to sell, the sheriff must have had possession; but after he had possession from Messer, and with his assent, Messer's subsequent possession must have been acquired under the sale, and not by virtue of his lien.

As between debtor and creditor the doctrine of lien is so equitable that it cannot be favored too much; but as between one class of creditors and another there is not the same reason for favor.

*Rule discharged.*¹

SCARFE v. MORGAN.

EXCHEQUER. 1838.

[*Reported 4 M. & W. 270.*]

TROVER for a mare. Pleas, first, not guilty; secondly, that the mare was not the property of the plaintiff. At the trial before *Parke*, B., at the last Assizes for the county of Suffolk, it appeared that the mare in question had been sent on more than one occasion to the premises of the defendant, who was a farmer, to be covered by a stallion belonging to him, and the charge of 11s. for the last occasion not having been paid, the defendant refused on demand to deliver up the mare, claiming a lien not only for the 11s., but for a further sum amounting altogether to £9 7s. 4½d., for covering other mares belonging to the plaintiff, and including also a small sum for poor-rates; on which demand and refusal, the plaintiff, without making any tender of the 11s., brought the present action. It also appeared in evidence that the contract in question was made and executed on a Sunday. The learned judge, on these facts being proved, directed the jury to find a verdict for the

¹ But see *Lambert v. Nicklass*, 45 W. Va. 527. As to loss of lien by taking other security, see *Angus v. MacLachlan*, 23 Ch. D. 330; *In re Taylor*, [1891] 1 Ch. 590.—ED.

plaintiff for £25, the value of the mare, giving liberty to the defendant to move to enter a nonsuit on the three following points, which were raised at the trial: — First, whether this was a case in which any lien would exist at all; secondly, if it could, whether the defendant had waived his lien for this particular charge by insisting on payment of his whole demand; and thirdly, whether this contract, being made and executed on a Sunday, was void by the statute 29 Car. 2, c. 7. Byles having, in Easter Term, obtained a rule *nisi* accordingly, —

Kelly and *Gunning* showed cause.

Byles and *O'Malley*, contra.

PARKE, B. With respect to the principal point in this case (which has been very well argued on both sides) as to the right of lien on a mare for the expense of covering, we will take time to consider our judgment; but, assuming that there was a lien, the court have no difficulty as to the other two points. As to the first point argued by Mr. Kelly, the court are unanimous in considering that if the defendant had a lien, he did not waive it under the circumstances of this case, by claiming to hold the mare not merely for the expense of covering her, but also for the expense of covering other mares belonging to the same plaintiff, and also for some payments made in respect of poor-rates which he had against him. The only way in which such a proposition could be established, would be to show that the defendant had agreed to waive the lien, or that he had agreed to waive the necessity of a tender of the minor sum claimed to be due. Looking at the mode in which he made the claim, and at the ground on which he considered it to be made, I think it is clear he has not waived the lien, or excused the necessity of making a tender; for when the demand was made he said, “I have a general account with you, on which a balance is due to me of so much,” and part of it was, particularly, a charge of 11s. for covering this mare. The cases referred to by Mr. Kelly seem to be distinguishable from the present. In the case of *Boardman v. Sill*, the defendant did not mention his lien at all, but claimed to hold the goods on the ground of a right of property in them, and did not set up any claim of lien at all. In *Knight v. Harrison*, the ground of refusal was, that the right of property was in another person as to the goods in question, and that he had a general lien for expenses on those goods. Neither of those two cases appears to me to apply to the present. In this case it would be strange to say that the defendant meant to waive his lien of the 11s. when that was one of the things he said he would hold the mare for, and it would be equally strange to say that he meant to excuse the tender of that sum, when no tender was made of any sum at all. I do not mean to say that such circumstances may not occur as would amount to the waiver of a lien, and of the tender, but that a great deal more must have passed than was proved to have passed on the present occasion. If he had said, “You need not trouble yourself to make a tender of the sum for which I have a lien, and I shall claim to hold the mare for it,” the plaintiff would then be in the

same situation as if a tender had been made ; but we think the defendant cannot be deprived of his right of holding the property on which he had a lien, by anything that has passed on the present occasion. Then, as to the other objection, that this was an illegal contract, on the ground of its having been made on a Sunday ; we are of opinion that this is not a case within the statute 20 Car. 2, c. 7, which only had in its contemplation the case of persons exercising trades, &c. on that day, and not one like the present, where the defendant, in the ordinary calling of a farmer, happens to be in possession of a stallion occasionally covering mares ; that does not appear to me to be exercising any trade, or to be the case of a person practising his ordinary calling. But independently of that consideration, this is not the case of an *executory* contract ; both parties were *in pari delicto* — it is one which has been executed, and the consideration given ; and although in the former case the law would not assist one to recover against the other, yet if the contract is executed, and a property either special or general has passed thereby, the property must remain ; and on that ground also, this lien would be supported, though it were or might have been illegal to have performed this operation on a Sunday. It seems to me, however, that it was not so ; there is nothing like a trade, and no direct dealing on a Sunday. The only point, therefore, now to be determined, is, whether the defendant had any lien at all of this description ; and upon that we will take time to consider.

BOLLAND, B. I am of the same opinion in this case as my Brother Parke, as to these two points ; and I confess I have a very strong opinion in favor of the defendant on the other.

ALDERSON, B. Upon the two points on which the court has given judgment, I entirely concur. It seems to me a monstrous proposition, to say that a party who claims in respect of two sums to detain a mare, is to be supposed to have waived his right to detain her as to one. The more natural conclusion is, that the defendant intended to act upon both ; if so, and if the other party is informed of that, it then became his duty to consider whether he would tender one or the other ; and with respect to the observation that has been cited as having fallen from Lord Tenterden, that if the defendant had given notice, the plaintiff would have paid, an equally strong observation appears to arise the other way ; for probably had the plaintiff said, “I tender you this sum, which I admit I am bound to pay,” it might cause the defendant to reflect whether he really had a right to detain the mare as to the other. It seems to me you cannot say, that because the party claims more than it may be ultimately found he had a right to, he would not have a right to a tender of the sum which the other ought to pay.

GURNEY, B., concurred.

Cur. adv. vult.

The judgment of the court on the principal point was delivered in this term by —

PARKE, B. The court have already disposed of two questions argued

in this case. The first, whether the defendant's lien on the plaintiff's mare, if it existed, was waived by a claim to retain her, not merely for the amount due on the particular occasion, but also on others, as well as for a debt of a different kind. The second, whether the circumstance, that the transaction occurred on a Sunday, rendered the lien invalid. We expressed our opinion on the first point, that there was no waiver of the lien, nor any dispensation with the tender of the amount due on that occasion; and on the second, that this was not a transaction in the course of the ordinary calling of the defendant; and if it was, that still the lien would exist, because the contract was executed, and the special property had passed by the delivery of the mare to the defendant, and the maxim would apply, *in pari delicto potior est conditio possidentis*.

The only remaining question upon which the court reserved its opinion is, whether the defendant is entitled to a specific lien on the animal, the subject of the action. The jury have found that it was delivered into his possession for the purpose mentioned; that the sum is still due; and that the mare remained in the defendant's possession after the claim had arisen and was due.

The case is new in its circumstances, but must be governed by these general principles which are to be collected from the other cases in our books.

The principle seems to be well laid down in *Bevan v. Waters*, by Lord Chief Justice Best, that where a bailee has expended his labor and skill in the improvement of a chattel delivered to him, he has a lien for his charge in that respect. Thus, the artificer to whom the goods are delivered for the purpose of being worked up into form; or the farrier by whose skill the animal is cured of a disease; or the horse-breaker by whose skill he is rendered manageable, have liens on the chattels in respect of their charges. And all such specific liens, being consistent with the principles of natural equity, are favored by the law, which is construed liberally in such cases.

This, then, being the principle, let us see whether this case falls within it; and we think it does. The object is that the mare may be made more valuable by proving in foal. She is delivered to the defendant that she may by his skill and labor, and the use of his stallion for that object, be made so; and we think, therefore, that it is a case which falls within the principle of those cited in argument.

But there is another difficulty which, unless answered, would prevent the lien from taking effect. It is clear that, even in such cases, if the nature of the contract applicable to such skill or labor be inconsistent with the lien, that the latter, which is but a stipulation annexed impliedly to the contract, cannot exist. Prior to the case of *Chase v. Westmore*, the general opinion had been that there could be no lien where there was any express contract at all. That case, however, decided, that where there was an express contract, but containing no stipulation inconsistent with the lien, it might still exist. In the case

of the livery-stable keeper there is such an inconsistency, because, by the nature of the contract itself, the possession is to be redelivered to the owner whenever he may require it. In fact, that falls within the principle of the time of payment being, by the contract itself, postponed to a period after the redelivery of the chattel. The doubt as to the case of the trainer, in *Jacobs v. Latour*, turns on this. There the question is, whether in the contract for training, there is a stipulation for the redelivery of the horse trained for the purpose of racing. So, again, if a time be fixed for the payment; for there the lien is inconsistent with the right of intermediate redelivery.¹

This case, however, presents no such difficulty; there does not appear here any such inconsistency. The mare is delivered for the purpose of being covered, and for a specific price to be paid for it. In this there is nothing inconsistent with the implied condition that the defendant shall detain her till payment. And on the contrary, according to *Cowper v. Andrews*, Hob. 41, cited in *Chase v. Westmore*, the word "for" works by condition precedent in all personal contracts, as, if I sell you my horse *for* ten pounds, you shall not take my horse except you pay the ten pounds.

So that, in this case, the lien is more consistent with this contract than the denial of it.

It occurred to us in the course of the discussion which was very ably conducted on both sides, that there was a difficulty arising out of the circumstance that this being a living chattel, might become expensive to the detainer, and that the allowance of such a lien would raise questions as to who was liable to feed it intermediately. But Mr. Byles answered this difficulty satisfactorily, by referring us to the analogous case of a distress kept in a pound covert, where he who distrains is compellable to take reasonable care of the chattel distrained, whether living or inanimate, and to the case of a lien upon corn, which requires some labor and expense in the proper custody of it.

Other cases were cited in the argument, but they were cases of general lien, which clearly turn upon contract or usage of trade, in which he who seeks to establish such contract or usage *ultra* the general law, is held to strict proof of the exception on which he relies. These are wholly distinguishable from this case.

Upon the whole, we think this lien exists, and judgment must be for the defendant.

*Rule absolute to enter a nonsuit.*²

¹ See *Crawshay v. Homfray*, 4 B. & Ald. 50. — Ed.

² See *Kerford v. Mondel*, 28 L. J. N. s. 303; *Loewenberg v. Arkansas Ry. Co.*, 56 Ark. 439; *Sutton v. Stephan*, 101 Cal. 545; *Thatcher v. Harlan*, 2 Houst. 178; *Hamilton v. McLaughlin*, 145 Mass. 20.

"The principles invoked on both sides are essentially those of equitable estoppel. Each party contends that the other neglected to speak when it was his duty to speak, whereby the other was intentionally misled into doing or omitting to do what otherwise he would not have done or omitted. These equitable principles are enforced in actions at law when they go to the whole action. When the facts on which a lien rests are as well known to the plaintiff as to the defendant, and the

MULLINER v. FLORENCE.

COURT OF APPEAL. 1878.

[Reported 3 Q. B. Div. 484.]

ACTION for the detention and conversion of horses, carriages, and harness.

At the trial at the Warwickshire Summer Assizes, 1877, before *Pollock*, B., the following facts were given in evidence. The defendant kept an inn at Coventry, and at the end of September, 1876, one Bennett came to the defendant's inn and stayed there as a guest until the middle of January, 1877, when he quitted the inn. Bennett was received by the defendant as an ordinary guest, and at the time of his departure from the inn he owed the defendant £109 for lodging, food, and entertainment. In November, 1876, a pair of horses, wagonette, and harness came to the defendant's inn for Bennett; he told the defendant that he had bought them from the plaintiff who lived at Leamington. The horses, wagonette, and harness were not taken in at livery, but were received by the defendant as a part of the property of his guest Bennett. At the time when the latter quitted the inn, he was in debt to the defendant for the keep of these horses, and the defendant claimed on this account from him £22 10s. Bennett left the horses, wagonette, and harness behind him at the defendant's inn. It was afterwards ascertained that Bennett was a swindler, and that he had bought the horses from the plaintiff upon the terms that if they should not be paid for they should be returned to him free of expense. Bennett did not pay the price for the horses. The plaintiff demanded from the defendant possession of the horses, wagonette, and harness, and tendered to him a sum of £20 for the keep of the horses; but the defendant refused to give up the horses, wagonette, and harness. The defendant sold the horses by auction for £73, but he retained possession of the wagonette and harness. Bennett was afterwards convicted of fraud, and sentenced to penal servitude. The defendant claimed to keep the proceeds of the sale, and also to retain the wagonette and harness, on account of the sums of £109 and £22 10s.

Upon these facts the learned judge directed judgment to be entered for the defendant.

defendant simply refuses to give up the property without alleging any reason, we do not think that a lien, if one exists, is thereby waived. It may be that, if the lien is unknown to the plaintiff, and the defendant knows or has reason to know this, it is the defendant's duty, when a demand is made upon him for the property, to give the plaintiff notice of the lien if he relies upon it; and it has been often held that, when the defendant puts his refusal upon a ground which is inconsistent with a lien, he cannot defeat an action by setting up a lien of which the plaintiff was ignorant at the time he brought the action." FIELD, J., in *Fowler v. Parsons*, 143 Mass. 401, 407.—ED.

Sir James Stephen, Q. C., and J. S. Dugdale, for the plaintiff.

Mellor, Q. C., and Graham, for the defendant.

BRAMWELL, L. J. The first question for our decision is, what was the innkeeper's lien? Was it a lien on the horses for the charges in respect of the horses, and on the carriage in respect of the charges of the carriage, and no lien on them for the guest's reasonable expenses, or was it a general lien on the horses and carriage and guest's goods conjointly for the whole amount of the defendant's claim as innkeeper? I am of opinion that the latter was the true view as to his lien, and for this reason, that the debt in respect of which the lien was claimed was one debt, although that debt was made up of several items. An innkeeper may demand the expenses before he receives the guest, but if he does not, and takes him in and finds him in all things that the guest requires, it is one contract, and the lien that he has is a lien in respect of the whole contract to pay for the things that are supplied to him while he is a guest. If this was not the case, a man might go to an hotel with his wife, and then it might be said that the innkeeper's lien was on the guest's luggage for what he had consumed, and on the wife's luggage for what she had had. The contract was, that the guest and his horses and carriage shall be received and provided for; there was one contract, one debt, and one lien in respect of the whole of the charges. The cases cited on behalf of the plaintiff are really against him. In order to justify the argument for him, it ought to be shown that if fifty pieces of cloth are sent to a dyer under one contract, he would only have a lien on each piece for the work done in respect of it. It seems to me, therefore, in this case the lien is a general lien. So far our judgment is for the defendant.

On the second question, namely, whether the sale was wrongful, I think the learned judge was wrong. The defendant, who had only a lien on the horses, was not justified in selling them, and he has therefore been guilty of a conversion, and that enables the plaintiff to maintain this action for the proceeds of the sale. The very notion of a lien is, that if the person who is entitled to the lien, for his own benefit parts with the chattel over which he claims to exercise it, he is guilty of a tortious act. He must not dispose of the chattel so as to give some one else a right of possession as against himself. The lien is the right of the creditor to retain the goods until the debt is paid. It is quite clear that the defendant could not use the horses, yet it is suggested that he can sell them and confer a title upon another person. Several cases were cited, but none of them are inconsistent with the present. Those mainly relied on were *Donald v. Suckling*, Law Rep. 1 Q. B. 585, and *Johnson v. Stear*, 15 C. B. (N. S.) 330; 33 L. J. (C. P.) 130. In the latter case it was no doubt held that the sale by the pledgee of an article pledged to him was tortious, and that the action could be maintained. But looking at the substance of the thing, and at the decision of *Halliday v. Holgate*, Law Rep. 3 Ex. 299, in all these cases the courts held that although the pledgee in repledging

the article had exceeded what he had a right to do, yet inasmuch as there remained in the pledgee an interest, not put an end to by the unauthorized pledge, he could transfer the pledge to another person. In *Johnson v. Stear* it certainly was held to be a tortious conversion. In the other two cases it was held not to be so. What in substance those cases decided was, that as the interest under the original pledge was not determined, the immediate right to the possession of the chattels was not re-vested in the pledgor so as to give him a right of action. Those cases, however, were cases between the pledgor and the pledgee, and have nothing whatever to do with the present case. The interests of the pledgee there could be assigned, but here the parting with the chattels subject to the lien destroyed it.

The third question argued was as to the amount of damages. The general rule is that where a person converts property to his own use by selling it and receives the price, he is liable for the value of the article, and he cannot set off. Now what were the authorities cited to the contrary? *Chinery v. Viall*, 5 H. & N. 288; 29 L. J. (Ex.) 180, is distinguishable on the ground that the case was decided on its special facts. The ground of the decision was that "as the vendor could not sue for goods bargained and sold, the result would be that he could not in any form of action recover the price; and it would be singular if the same act which saved the vendee the price of the sheep should vest in him a right of action for the full value without deducting the price." I cast no doubt on that case; the ground on which it is based is different. The next case was *Brierley v. Kendall*, 17 Q. B. 937; 21 L. J. (Q. B.) 161. That was an action of trespass, and the plaintiff had mortgaged the goods wrongfully seized by the defendants as a security for money advanced by them to him. Another case was *Johnson v. Stear*. I only wish to add one word as to that case. The court there held that the action was maintainable, but I see that Blackburn, J., in his judgment in *Donald v. Suckling*, at p. 617, doubts whether that case was rightly decided, because he says, "This can be reconciled with the cases above cited, of which *Fenn v. Bittleston*, 7 Ex. 152; 21 L. J. (Ex.) 41, is one, by the distinction that the sale, though wrongful, was not so inconsistent with the object of the contract or pledge as to amount to a repudiation of it, though I own that I do not find this distinction in the judgment of *Johnson v. Stear*." So that Blackburn, J., doubts whether the Court of Common Pleas were right in that case in giving the plaintiff even nominal damages. Whether that decision is right or not, the plaintiff clearly was not entitled to substantial damages. The reasoning in that case, however, is not applicable to the present. But there is a remark of Williams, J., in his judgment, at p. 134, which I think is applicable; it is this: "The true doctrine, as it seems to me, is that whenever the plaintiff could have resumed the property, if he could lay his hands on it, and could have rightfully held it when resumed as the full and absolute owner, he is entitled to recover the value of it as damages in the action of trover

which stands in the place of such resumption." Now in this case if the plaintiff, after the sale of the horses, had thought fit to go to the vendee and say to him, "Those horses are mine," and the vendee had refused to give them up, he could have maintained an action against the vendee for the full value of the horses; but instead of acting in this manner he has treated the sale by the defendant as a conversion. He is not to be worse off because he has brought his action against the defendant instead of against the vendee. It is said if the plaintiff succeeds that the defendant's lien would be useless to him, and that the plaintiff would be better off than he was before the sale of the horses by the defendant. I do not think there is anything unreasonable in holding the defendant liable if the defendant was not bound to feed the horses. In a case of a distress damage feasant before the recent statute (12 & 13 Vict. c. 92) the distrainor was not bound to feed the animals distrained.

It seems to me, therefore, that the learned judge was wrong. I think that we ought to reverse the judgment, and give the plaintiff judgment for £73, but as the defendant has a lien on the carriage and harness for the whole bill, and that amount was not tendered, the defendant is entitled to retain his judgment as to the wagonette and harness. Under these circumstances the judgment will be entered for the plaintiff for £73, and as to the rest of the case the judgment will stand for the defendant.

BRETT, L. J. This was an action against the defendant in respect of a wrongful sale of the plaintiff's horses, and in respect of a wrongful withholding from him of a carriage and harness. The defence set up is that the defendant held the horses and the carriage and harness under a lien, and that the plaintiff therefore could not maintain the action in respect of any of them. The lien claimed by the defendant was that of innkeeper.

The first question is, What is the extent of an innkeeper's lien, and to what goods did the lien attach? I am of opinion the lien attached both on the horses and the carriage and harness for the full amount of the innkeeper's bill. Where the innkeeper in the course of his ordinary business receives not only travellers but also their horses and carriages, he has an innkeeper's lien for his whole claim. He has one obligation, he is bound to receive the traveller and any horses or carriages he may bring with him; and as there is but one business, one obligation, and one contract, according to the custom of England it gives him one lien, and the lien cannot be split up and a separate lien claimed in respect of separate chattels. Therefore here the defendant has a lien for the whole bill incurred by Bennett, and that lien is on the carriage and horses and harness.

With regard to the horses, the defendant has sold the horses; it was an unjustifiable sale; he had no right to sell them, and as he had only a lien, the sale destroyed the lien. If he had parted with the possession in the horses, he would have lost the lien, and so in the case of a

wrongful sale the lien is destroyed. With regard to the carriage and harness, the defendant has a lien on them for his whole account. The plaintiff was willing to pay some portion of the bill, but he never was willing to pay the whole amount. Then it was said, although the defendant improperly sold the horses, yet the plaintiff is not entitled to maintain the action, because the defendant had a lien on them, and the plaintiff has not tendered the amount of the lien. But this argument is not tenable, for by the sale the lien was destroyed, and there is no debt due from the plaintiff to the defendant. It does not seem to me to be necessary to decide whether the cases cited were rightly decided or not. *Donald v. Suckling*, Law Rep. 1 Q. B. 585, and *Halliday v. Holgate*, Law Rep. 3 Ex. 299, were cases not of lien, but where the property had been pledged with a power of sale; and the judgments in these cases were founded on the distinction which existed between the cases of pledge and lien, therefore those cases signify nothing, this not being a case of pledge. With regard to *Johnson v. Stear*, 15 C. B. (N. S.) 330; 33 L. J. (C. P.) 130, that also was the case of property pledged, and it is no authority in the present instance. At all events, I should say that those cases were only authorities if the action had been brought by Bennett, but none whatever as against the plaintiff who is seeking to recover his own property.

With regard to the damages, even if *Johnson v. Stear* be an authority against an action by Bennett, it is no authority as against the plaintiff, who has an absolute right of property, and as there has been a wrongful sale he is entitled to recover full damages. However, *Johnson v. Stear* would require very great consideration before it was acted upon.

As to the plaintiff's claim to the carriage and harness, the defendant had a lien on the carriage and harness, and the plaintiff cannot recover as to them, but he is entitled to recover the sum of £73 in respect of the horses.

In the result the plaintiff will have judgment for £73, which will carry the general costs of the cause, the defendant's costs to be deducted; and with respect to the appeal, as each party has substantially succeeded, no costs of the appeal will be allowed.

COTTON, L. J. The question is, what is the defendant's lien as innkeeper? Is it a lien as to the whole bill in respect of all the things brought by the guest to the inn, or is it a separate lien as regards the horses and also with respect to the harness and carriage? The innkeeper has a general lien for the whole amount of his bill. As to the horses, harness, and carriage, there would be a lien for any special expenditure, and there is no reason for exempting the horses, harness, and carriage from the general lien an innkeeper has in the guest's goods by the general law. The innkeeper is bound to receive the horses, harness, and carriage with the guest as much as he is bound to receive the guest himself—the liability of the innkeeper with respect to them is the same as his liability with respect to the other goods of the guest, and there is no reason for excluding the claim of

the innkeeper although the horses, harness, and carriage are not received in the dwelling-house, but in adjoining buildings. There is no authority for saying that the innkeeper's lien does not extend to the horses, harness, and carriage the guest brings with him as much as to the other things of the guest.

With regard to the harness and carriage, although the plaintiff tendered the amount due in respect of the horses, the defendant had a lien on the harness and carriage, and as to them the defendant is entitled to our judgment.

As to the horses, it was not contended that the sale was right, but the question was argued that as the plaintiff could not have taken them out of the hands of the defendant without satisfying his lien, he could not recover substantial damages. I do not accede to this argument. The defendant as an innkeeper has only a right to keep the horses until his bill is paid; he has parted with his possession and put an end to his right. The plaintiff therefore has an absolute title to the horses, and is entitled to such damages as amount to the real value. Although the defendant received the horses at the inn, and the innkeeper's lien attached, yet the lien is lost by the act of the defendant, and the innkeeper cannot claim anything as against the plaintiff as there is no debt owing from one to the other. *Johnson v. Stear* was decided on the principle that the person who sold the goods had some interest in them, and that case is different from the present, where the person has only a right of detainer. Erle, C. J., says, "The deposit of the goods in question with the defendant to secure payment of a loan by him to the depositor on a given day, with a power to the defendant to sell in case of default on that day, created an interest and a right of property in the goods which was more than a mere lien." What, therefore, Erle, C. J., says is, assuming that the sale was wrongful, the defendant had an interest in the goods, and the owner can therefore only recover the real damage that he has actually sustained.

The judgment, therefore, will be entered for the plaintiff in £73, and for the defendant so far as relates to the harness and carriage.

Judgment accordingly.

HANNA v. PHELPS.

SUPREME COURT OF JUDICATURE OF INDIANA. 1855.

[Reported 7 Ind. 21.]

APPEAL from the Wabash Circuit Court.

DAVISON, J. *Assumpsit*. The complaint is that Phelps, the plaintiff below, on the first day of December, 1849, delivered to Hanna and Burr, who were then engaged in the business of rendering lard from hogs' heads by steam, and barrelling the lard so rendered for hire at the

town of Wabash, three thousand hogs' heads, which they agreed to render into lard, and barrel the same for the plaintiff, within a reasonable time, &c., for which service he agreed to pay them a reasonable compensation, &c. It is averred that the defendants have failed to perform the agreement on their part, &c.

Pleas: 1. The general issue; 2. Performance; 3. That the plaintiff was indebted to the defendants \$200 for rendering lard and barrelling the same, &c., which sum exceeds in amount their indebtedness to him, &c.

Issues being made on these pleas, the cause was tried by the court, who found for the plaintiff. New trial refused, and judgment.

The court, upon the defendants' motion, gave a written statement of the facts on which its finding was based, and of the conclusions of law arising on the facts. That statement is as follows:—

1. The plaintiff delivered to the defendants, as bailees, two thousand one hundred hogs' heads, out of which lard was to be rendered by them for him, which heads each produced four pounds of lard, making eight thousand four hundred pounds.

2. The defendants delivered to the plaintiff, at Jackson's warehouse, in the town of Wabash, in twenty-three barrels, 5,162 pounds of lard, leaving unaccounted for and undelivered 3,238 pounds. The lard was worth 5 cents per pound, making for the last-named quantity in money \$161.90. As a compensation for rendering said lard the defendants were entitled to \$84, leaving a balance due the plaintiff of \$77.90.

3. The plaintiff, after the delivery of the twenty-three barrels, and before the commencement of this suit, notified the defendants to deliver to him all the lard made from said heads; but they declined to deliver any more lard. He did not at any time before the suit either pay or tender to them any sum for their services, nor was any demand made by them for such services. When the twenty-three barrels were delivered, the lard was subject to their claim for rendering the same, amounting to \$51.63, which amount was never paid to them. The delivery at Jackson's warehouse was with his consent.

These were all the facts proved in the cause; and upon them the court, as a conclusion of law, decided that no payment or tender for services in rendering the lard was necessary before suit.

Was this decision correct? Generally speaking, if a chattel delivered to a party receive from his labor and skill an increased value, he has a specific lien upon it for his remuneration, provided there is nothing in the contract inconsistent with the existence of the lien. And such lien exists equally whether there be an agreement to pay a stipulated price for "the labor and skill," or an implied contract to pay a reasonable price. The present is one of the cases in which liens usually exist in favor of the party who has bestowed services on property delivered to him for the purpose. And unless the record discloses facts or circumstances sufficient to produce the inference that the defendants waived their lien before the institution of this suit, they were not compelled to give up the property when the plaintiff demanded it without the

payment or tender of a reasonable compensation for rendering and barrel-ling the lard. If the defendants, at the time of the demand, had refused, on the ground of their lien, to part with the property, the law of this case would be clearly in their favor; but here the plaintiff's demand was answered by an absolute refusal to deliver any more lard. We are therefore to inquire whether that refusal waived the lien.

Upon this subject the authorities are not uniform. In England the rule seems to be that a person having a lien upon goods does not waive it by the mere fact of his omitting to state that he claims them in that right when they are demanded. But if a different ground of retention than that of the lien be assumed, the lien ceases to exist. *White v. Gainer*, 9 Moore, 41; 2 Bing. 23; 1 Carr. & P. 324; 1 Camp. 410. It is, however, contended that the refusal of the defendants, to have shielded them, should have been qualified by their claim of a lien. There is authority in support of that position. *Dow v. Morewood*, 10 Barb. 183, was replevin for twenty-one cans of oil. In that case it was held "that the defendant having upon demand made, refused to deliver the oil to the plaintiff without setting up any lien thereon, waived his right to set up a lien afterwards for freight, &c.; that he could not be allowed to deny the plaintiff's title before suit brought, and afterwards defeat a recovery by setting up a lien."

We are inclined to adopt this rule of decision. An unqualified refusal, upon a demand duly made, is evidence of a conversion; because it involves a denial of any title whatever in the person who makes the demand. In the case before us the defendants "declined to deliver any more lard." This was, in effect, an assumption that they had in their possession no more belonging to the plaintiff. At least he had a right to infer from their answer to his demand that they would deliver to him no more lard unless compelled to do so by action at law. And having thus assumed a position relative to the property inconsistent with his title, he had, further, the right to infer that a tender to the defendants for their services would be unavailing. We are of opinion that the facts proved are sufficient to sustain the judgment.

There is a point made as to the jurisdiction of the court. This case was tried by the Hon. Thomas S. Stanfield, judge of another circuit, at a special term held in June, 1853; and it is contended that all the steps required by law to authorize such special term have not been taken. 2 R. S., p. 5, s. 3. We have heretofore decided that the above special term was held in conformity with the statute just cited. *Murphy v. Barlow*, 5 Ind. R. 230.

The judgment must be affirmed.

PER CURIAM. The judgment is affirmed, with five per cent damages and costs.

H. P. Biddle, for the appellants.

D. D. Pratt and *D. M. Cox*, for the appellee.

MEXAL v. DEARBORN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1859.

[Reported 12 Gray, 336.]

ACTION of tort for taking a quantity of calf skins. The declaration in one count alleged title in the plaintiff; and in another a lien for work done upon them by the plaintiff as a currier. Answer, that the goods belonged to William Jameson, and were taken possession of under a warrant issued in proceedings in insolvency against Jameson, directed to the defendant as messenger.

At the trial in the superior court of Suffolk at September term, 1857, the plaintiff offered evidence that the calf skins were left with him by Jameson to be curried; and that when the work was partially done, Jameson sold them to him in payment of a debt due him, a part of which was for the work done on these skins, and gave a bill of sale thereof to the plaintiff, in whose possession they then were.

It appeared that proceedings in insolvency were duly commenced against Jameson soon after this sale; and a warrant issued to the defendant as messenger, on which he took the skins. The defendant offered evidence that the sale to the plaintiff was fraudulent and void as against Jameson's creditors.

The plaintiff claimed to recover the whole value of the skins, on the ground that the sale was not fraudulent; and also to recover on the second count, the amount of work performed on the skins, on the ground that he had a subsisting lien on them therefor.

Abbott, J., ruled, "that if the plaintiff bought the skins of Jameson, taking a bill of sale of them, together with the possession, and this purchase was good as between the parties, then if the jury were satisfied that the sale was fraudulent as against the creditors of Jameson, and that when the defendant took them the plaintiff claimed under said bill of sale to him, and not on the ground of having a lien on them, and had so continued in his claim till the commencement of this action, never demanding the amount of his lien of the defendant, or notifying him that he claimed any, but persisting in his claim under the sale to him, the plaintiff would not be entitled to recover on the second count the amount of his lien." The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

F. J. Butler, for the plaintiff.

P. Willard, for the defendant.

MERRICK, J. By purchasing the calf skins, which had been put into his possession to be curried, and by taking a bill of sale thereof, and afterwards, to the time of the commencement of this action, claiming them solely under that title, without having given notice of any other to the defendant when he took them away in discharge of his duty as messenger under the proceedings in insolvency against the vendor, the

plaintiff lost or waived the lien which he had previously acquired. A good and sufficient consideration was paid for the transfer of the property, and as between the parties to the contract the sale was absolute and complete. The ownership thus obtained was entirely inconsistent with the existence of the previous lien. A lien is an incumbrance upon property, a claim upon it which may be maintained against the general owner. But there is no foundation upon which he who owns the whole can create a special right in his own favor to a part. The inferior or partial title to a chattel necessarily merges in that which is absolute and unconditional, when both are united and held by the same individual. This is a general consequence. But in the present instance, it is obvious that the parties extinguished, and intended to extinguish, the lien which had been previously created upon the calf skins; for the value of the work and labor which had previously been bestowed upon them by the vendor was by their express agreement made part of the consideration of the sale. After such a transaction the rights of the parties were wholly changed. The vendor could no longer assert any claim to the property, and the workman had none against his employer. His debt had been paid, the property had become his own, and a lien upon it in his own favor thereby rendered both needless and impossible.

But the result is the same if the facts upon which the ruling excepted to in the superior court was made are considered in another aspect. The law will not allow a party to insist upon and enforce in his own behalf a secret lien upon personal property after he has claimed it unconditionally as his own, and has thereby induced another to act in relation to it, in some manner affecting his own interest, as he would, or might, not have done if he had been openly and fairly notified of the additional ground of claim. It would be fraudulent in him to practise such concealment to the injury of others; and to prevent the possibility of attempts so unjust becoming successful, the law implies that an intended concealment of that kind is of itself a waiver of the lien. The authorities cited by the counsel for the defendant, not less than its intrinsic reasonableness, fully warrant the ruling to which the plaintiff objected.

Exceptions overruled.

CALDWELL v. TUTT.

SUPREME COURT OF TENNESSEE. 1882.

[Reported 10 Lea, 258.]

APPEAL in error from the Circuit Court of Montgomery County.
JO. C. STARK, J.

Daniels & Goodpasture, for Caldwell & Shelton.

W. A. Quarles, for Tutt.

FREEMAN, J., delivered the opinion of the court.

This case is as follows: Plaintiffs are livery-stable keepers in the city of Clarksville. Mr. Mumford had placed his horse in the stable to be kept by the owners of the stable. He was in the habit of taking said horse from the stable occasionally for a ride, by and with the consent of the keepers of the stable. While riding him on one of these occasions, the horse was levied on by defendant, a constable, by virtue of an execution against the owner.

The question submitted to the court was, whether the livery-stable keepers, whose bill for board of the horse was unpaid, had a lien on the horse for its payment, or the execution levy was superior to it? The circuit judge decided in favor of the defendant, and that on these facts no lien existed at the time of the levy, from which there is an appeal in error to this court.

The case turns mainly on sections 1993 *a* and 1993 *e* of the Code. The first provides: "Whenever any horse or other animal is received to pasture for a consideration, the former shall have a lien upon the animal for his proper charges, the same as the innkeeper's lien at common law." The latter section is: "Livery-stable keepers shall be entitled to the same lien provided for in section 1 of this act, on all stock received by them for board and feed, until all reasonable charges are paid."

The question then is, would an innkeeper be entitled to his lien under the facts in this case? for the livery-stable keeper has such a lien as the innkeeper, until all reasonable charges are paid. The nature of the business, and necessary implications arising from the character of the undertaking or contract, is to be taken into consideration in arriving at the proper result.

The right of the innkeeper is to detain or hold the horse till the price of his provender is paid: 3 Parsons, 249. Mr. Parsons adds: "What shows the spirit and principle of the rule, if he permit his guest or horse to depart on credit, he loses his lien, and can never arrest it after for that debt if the guest come again."

Take the nature of this contract, and its surroundings, and apply this rule in its spirit, and we have the solution of the question.

The party puts his horse to board at a livery stable in his own town. He, as owner, takes his horse out temporarily for a ride, it may be of a morning or an evening, for exercising himself or horse, or both. The innkeeper permits this, as was fairly implied in the nature of the contract. It certainly cannot be maintained, that he thereby intends to permit the party to depart with the horse, and credit him for the board; on the contrary, it is well understood that the possession will in a short time be restored. The horse is not intended to be allowed to depart from his custody so as to end the bailment, but only a temporary user of the owner to be allowed. In a word, neither party thought of terminating the contract,—or of the one taking and the other yielding possession,—so as to give an individual credit alone for the board, and release thereby the lien of the livery man.

This being the fair meaning of the contract, and of the acts of the parties, it would seem unquestionable that, as against Mumford, the livery-stable keeper would have still retained his lien, and if so his creditor must take his shoes, and can only take his property *cum onere*, as the owner himself held it at the time of seizure. It would have been a fraud on the part of Mumford had he assented to what had been done, terminated the bailment, and released the lien. His creditor can stand no higher.

VINAL *v.* SPOFFORD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1885.

[Reported 139 Mass. 126.]

REPLEVIN of one horse, one grocery wagon, one open buggy, one express harness, and one buggy harness. Writ returnable to the Municipal Court of the city of Boston. That court entered judgment for the plaintiff for all the articles replevied except the horse, with damages and costs; and also entered judgment for the defendant for a return of the horse, and for damages and costs. The plaintiff appealed to the Superior Court from the latter judgment. Trial in that court, before *Brigham*, C. J., who allowed a bill of exceptions, in substance as follows:

The defendant contended that he had a right, under the plaintiff's appeal, to try the question of the title to the wagon and the harnesses; but the judge ruled that he had no such right, and excluded evidence offered in regard to such title.

As to the horse, there was evidence tending to prove the following facts: Howard Vinal, the father of the plaintiff, during the two years prior to January 4, 1883, had owned a stock of groceries, and also the horse described in the plaintiff's declaration, which he had used in connection with his business of a grocer, at a shop in Boston, and during seven months of this period had hired the keeping of said horse at the livery stable of the defendant. On January 4, 1883, Howard Vinal, being embarrassed in his business, executed and delivered a bill of sale of all the stock, furniture, and fixtures owned by him in said shop, together with said horse, to the plaintiff, and on the same day delivered the horse to the plaintiff, in consideration of the plaintiff's promissory note, payable on demand, for a certain sum, which was received by Howard Vinal, on payment of said note, and applied by him to carry into effect a composition with most of his creditors.

At this time of this composition, Howard Vinal requested the defendant to become a party thereto, but the defendant, whose claim against Howard Vinal for keeping the horse was from \$160 to \$190, refused so to do unless the full amount of his claim was paid; and he did not

become a party to said composition during the keeping of the horse at the defendant's livery stable, before and after the transaction of sale between Howard Vinal and the plaintiff. After January 4, 1883, the shop was conducted with the same sign upon it as before; the horse was used in the business of said shop as before, and Howard Vinal conducted, for a salary of \$12 per week, the business of the shop, with the same clerks as before, while the plaintiff carried on the business of his shoe shop on another street.

The daily custom in the matter of the use and keeping of said horse was this: it was taken by Howard Vinal, or by some person acting under his direction, from the defendant's livery stable early in the morning, and used at the shop in its business until noon, then was taken to the defendant's stable to be baited; afterwards it was taken to the shop, and there used until evening, when it was returned to the defendant's livery stable, and was there kept until the following morning. While the horse was at the shop, according to the daily custom, on January 4, 1883, he was delivered to the plaintiff, under the transaction of sale; and, without notice thereof to the defendant of said transaction, at the close of that day was returned to the defendant's livery stable, and kept and used as previously under said custom, until replevied in this action.

The contract for the keeping of the horse between Howard Vinal and the defendant was, that for its keeping the defendant should be paid one half in cash and one half in groceries from the shop, and before the replevin the defendant, or some person by his order, had received groceries to the amount of \$50 in part payment for the keeping. After January 4, 1883, and about ten days before the replevin, the defendant demanded money from Howard Vinal, or flour or sugar from the shop, in part payment of the sum due for the keeping of the horse. Howard promised to send flour for that purpose, but failed to do so, and in explanation told the defendant that the stock of his shop, horse, &c. had been sold by him to the plaintiff; and thereupon the defendant sent a person in his employ to take the horse, then at the shop in use as previously, and remove the same to his livery stable; and the horse was then and there removed, and remained in the defendant's livery stable until replevied in this action.

The plaintiff subsequently, at said livery stable, asked the defendant to give him a statement of how much he, the plaintiff, owed for the keeping of the horse, offering to pay the same; but the defendant refused to state any claim for the keeping of the horse against the plaintiff, declaring that the plaintiff owed him nothing for that keeping, but that his father, Howard Vinal, owed for that keeping; and thereupon this action was brought.

The foregoing is a statement of all the facts of which there was any evidence at the trial.

The defendant requested the judge to rule, that he had the right to take and to hold the horse, by virtue of his lien as a livery-stable

keeper, for the keeping of the horse, and that this lien was not impaired or interrupted by allowing the owner of the horse to use the same in his business of a grocer; that the facts and circumstances in evidence of his allowing the owner of said horse the use of the same did not, in law, constitute a waiver of such lien; and that the sale of the horse by Howard Vinal to the plaintiff, without the knowledge of the defendant until after he had taken the horse to his stable, could not operate to defeat the lien which he asserted for the keeping of the horse to the time of the sale and afterwards.

The judge refused to rule as requested by the defendant, and ruled that, upon the facts and circumstances in evidence, the defendant could not maintain the lien claimed by him against the plaintiff's right to the possession of the horse under his purchase of the same from Howard Vinal, or under his retaking of the horse at said shop upon obtaining knowledge of the purchase.

The defendant contended that the sale of the horse by Howard Vinal to the plaintiff was not an actual sale, but a colorable one, and fraudulent; and that, on the morning of the day when the defendant retook the horse, the defendant had been induced to permit the horse to be taken from his possession and from his livery stable by the fraudulent promise of Howard Vinal to send to the defendant flour from his shop, in part payment for the money then due for the keeping of said horse.

The jury found specially, upon questions submitted to them, that the sale of the horse by said Howard Vinal to the plaintiff was a valid sale, made in good faith and for a valuable consideration, and that the horse was not obtained from the livery stable of the defendant by false and fraudulent representations; and returned a general verdict for the plaintiff. The defendant alleged exceptions.

H. J. Edwards, for the defendant.

E. C. Gilman, for the plaintiff.

HOLMES, J. 1. When replevin is brought for a number of chattels, some of which belong to the plaintiff and others to the defendant, although all are declared for in one count, the case is dealt with as if there were two counts, and each party was entitled to prevail upon one. *Seymour v. Billings*, 12 Wend. 285. *Williams v. Beede*, 15 N. H. 483. Each party is an actor, and each may have a judgment and legal costs, as happened in this case. *Powell v. Hinsdale*, 5 Mass. 343. These judgments are distinct, and it follows that an appeal by one party only from the judgment against him does not reopen the judgment in his favor. Pub. Sts. c. 154, §§ 39, 43; c. 155, § 28. Justice and analogy lead to the same result. See *Downing v. Coyne*, 121 Mass. 347; *Whiting v. Cochran*, 9 Mass. 532; *May v. Gates*, 137 Mass. 389; *McDonough v. Dannery*, 3 Dall. 188, 198.

2. The jury have found that the plaintiff bought the horse in good faith and for a valuable consideration, and that it was not obtained from the defendant's stable by fraud. On the bill of exceptions we

must assume that the previous owner of the horse rightfully took it from the defendant's custody and delivered it to the plaintiff. Such a transaction would divest a common law lien. *Perkins v. Boardman*, 14 Gray, 481. We are of opinion that it equally divested that which the defendant had previously acquired under the Pub. Sts. c. 192, § 32 (St. 1878, c. 208). That statute creates a lien in cases where the common law has not recognized one. *Goodrich v. Willard*, 7 Gray, 183. But it gives no intimation that it uses the word "lien" in any different sense from that which is known to the common law. On the contrary, it in terms supposes that the animals in question have been placed in the care, that is to say, in the possession, of the party to whom the lien is given. The provisions for sale would seem to imply the same thing. To admit that it was intended to create a tacit hypothecation, like that enforced from necessity, but within narrow limits, in the admiralty, would be to go in the face of the whole policy of our statutes, which always strive to secure public registration when possession is not given and retained, and which expressly provide for such registration when they in terms create a lien not depending on possession. It follows from what we have said, that, even if the defendant had had a lien for the keeping of the horse after the sale, or whatever might be the rule when the animal was voluntarily restored to his possession, he lost it by allowing the plaintiff to take possession, and could not revive his right by seizing the horse. *Thompson v. Dolliver*, 132 Mass. 103. *Walker v. Staples*, 5 Allen, 34. *Papineau v. Wentworth*, 136 Mass. 543. *Exceptions overruled.*¹

D. Pledge.

JOHNSON v. STEAR.

COMMON PLEAS. 1863.

[Reported 15 C. B. N. S. 330.]

THIS was an action brought by the plaintiff as assignee of one Mathew Cumming, a bankrupt, for the alleged wrongful conversion by the defendant of 243 cases of brandy and a pipe of wine.

The defendant pleaded not guilty and not possessed, whereupon issue was joined.

The cause was tried before *Erle*, C. J., at the sittings in London after

¹ See *Jackson v. Cummins*, ante 159; *Forth v. Simpson*, 13 Q. B. 680; *Allen v. Smith*, 12 C. B. N. S. 638; *Perkins v. Boardman*, 14 Gray, 481; *Smith v. Marden*, 60 N. H. 509; *Seebaum v. Handy*, 46 Ohio St. 560. For cases of a pledgee giving up possession, see *Reeves v. Capper*, 5 Bing. N. C. 136; *Babcock v. Lawson*, 5 Q. B. D. 284; *North Western Bank v. Poynter*, [1895] A. C. 56; *Walker v. Staples*, 5 Allen, 34. — ED.

last Easter Term. The facts as proved or admitted were as follows: On the 26th of January, 1862, the bankrupt, Cumming, applied to the defendant for an advance of £62 10s. upon the security of certain brandies then lying in the London Docks. The defendant consented to make the advance, and Cumming gave him his acceptance at one month for the amount, at the same time handing him the dock-warrant for the brandies and the following memorandum:—

“I have this day deposited with you the undermentioned 243 cases of brandy, to be held by you as a security for the payment of my acceptance for £62 10s. discounted by you, which will become due January 29, 1863; and, in case the same be not paid at maturity, I authorize you at any time, and without further consent by or notice to me, to sell the goods above mentioned, either by public or private sale, at such price as you think fit, and to apply the proceeds, after all charges, to the payment of the bill; and, if there should be any deficiency, I engage to pay it. (Signed) M. CUMMING.”

Then followed an enumeration of the marks and numbers on the cases.

On the 3d of January, Cumming obtained from the defendant a further advance of £25 upon the security of a warrant for a pipe of port wine, with an I. O. U. and a post-dated check (7th January), but no distinct authority, as in the case of the brandies, to sell on default of payment on a given day.

Cumming absconded on the 5th of January, and was declared a bankrupt on the 17th; and the plaintiff was afterwards appointed assignee.

On the 28th of January, the defendant contracted to sell the brandies to Messrs. Ruck & Co. On the 29th (the day on which Cumming's acceptance became due) the dock-warrant was delivered to them, and on the 30th they took actual possession of the brandies. The check given by Cumming for the second advance being also dishonored, the defendant sold the wine for £40. The demand and refusal were on the 27th of February.

On the part of the defendant it was submitted that there was no conversion, and that the transactions were protected, the adjudication being now the dividing line; and that, at all events, the plaintiff was only entitled to nominal damages for the premature sale of the brandies,—it being assumed that the bankrupt had no intention to avail himself of his right of redemption.

Under the direction of the learned judge, the jury returned a verdict for the plaintiff, assessing the value of the wine at £40, and that of the brandies at £62 10s.; and leave was reserved to the defendant to move to enter a verdict for him if the court should be of opinion that the plaintiff was not entitled to recover.

Powell, in Trinity Term, moved for a rule accordingly.

Denman, Q. C., and *Howard*, now showed cause.

ERLE, C. J., now delivered the judgment of the majority of the court.¹

In trover by the assignee under the bankruptcy of one Cumming, the facts were that Cumming had deposited brandy lying in a dock with one Stear, by delivering to him the dock-warrant, and had agreed that Stear might sell, if the loan was not repaid on the 29th of January; that, on the 28th of January, Stear sold the brandy, and on the 29th handed over the dock-warrant to the vendees, who on the 30th took actual possession.

Upon these facts, the questions are, — first, was there a conversion? and, if yes, — secondly, what is the measure of damages?

To the first question our answer is in the affirmative. The wrongful sale on the 28th, followed on the 29th by the delivery of the dock-warrant in pursuance thereof, was, we think, a conversion. The defendant wrongfully assumed to be owner in selling; and, although the sale alone might not be a conversion, yet, by delivering over the dock-warrant to the vendees in pursuance of such sale, he interfered with the right which Cumming had of taking possession on the 29th if he repaid the loan; for which purpose the dock-warrant would have been an important instrument. We decide for the plaintiff on this ground: and it is not necessary to consider the other grounds on which he relied to prove a conversion. Then the second question arises.

The plaintiff contends that he is entitled to the full value of the goods sold by the defendant, without any deduction, on the ground that the interest of the defendant as bailee ceased when he made a wrongful sale, and that therefore he became liable to all the damages which a mere wrongdoer who had wilfully appropriated to himself the property of another without any right ought to pay. But we are of opinion that the plaintiff is not entitled to the full value of the goods. The deposit of the goods in question with the defendant to secure repayment of a loan to him on a given day, with a power to sell in case of default on that day, created an interest and a right of property in the goods which was more than a mere lien: and the wrongful act of the pawnee did not annihilate the contract between the parties nor the interest of the pawnee in the goods under that contract.

It is clear that the actual damage was merely nominal. The defendant by mistake delivered over the dock-warrant a few hours only before the sale and delivery by him would have been lawful; and by such premature delivery the plaintiff did not lose anything, as the bankrupt had no intention to redeem the pledge by paying the loan.

If the plaintiff's action had been for breach of contract in not keeping the pledge till the given day, he would have been entitled to be compensated for the loss he had really sustained, and no more: and that would be a nominal sum only. The plaintiff's action here is in name for the wrongful conversion; but, in substance, it is the same cause of action; and the change of the form of pleading ought not in reason to affect the amount of compensation to be paid.

¹ Consisting of himself, Byles, J., and Keating, J.

There is authority for holding, that, in measuring the damages to be paid to the pawnor by the pawnee for a wrongful conversion of the pledge, the interest of the pawnee in the pledge ought to be taken into the account. On this principle the damages were measured in *Chinery v. Viall*, 5 Hurlst. & N. 288. There, the defendant had sold sheep to the plaintiff; and, because there was delay in the payment of the price by the plaintiff, the defendant resold the sheep. For this wrong the court held that trover lay, and that the plaintiff was entitled to recover damages; but that, in measuring the amount of those damages, although the plaintiff was entitled to be indemnified against any loss he had really sustained by the resale, yet the defendant as an unpaid vendor had an interest in the sheep against the vendee under the contract of sale, and might deduct the price due to himself from the plaintiff from the value of the sheep at the time of the conversion.

In Story on Bailments, § 315, it is said: "If the pawnor, in consequence of any default or conversion by the pawnee, has recovered back the pawn or its value, still the debt remains and is recoverable, unless in such prior action it has been deducted: and it seems that, by the common law, the pawnee in such action for the value has a right to have the amount of his debt recouped in damages." For this he cites *Jarvis v. Rogers*, 15 Mass. R. 389. The principle is also exemplified in *Brierly v. Kendall*, 17 Q. B. 937. There, although the form of the security was a mortgage, and not a pledge; and although the action was trespass and not trover; yet the substance of the transaction was in close analogy with the present case. There was a loan by the defendant to the plaintiff, secured by a bill of sale of the plaintiff's goods, in which was a reservation to the plaintiff of a right to the possession of the goods till he should make default in some payment. Before any default, the defendant took the goods from the plaintiff and sold them. For this wrong he was liable in trespass; but the measure of damages was held to be, not the value of the goods, but the loss which the plaintiff had really sustained by being deprived of the possession. The wrongful act of the defendant did not annihilate his interest in the goods under the bill of sale; and such interest was to be considered in measuring the extent of the plaintiff's right to damages.

On these authorities we hold that the damages due to the plaintiff for the wrongful conversion of the pledge by the defendant, are to be measured by the loss he has really sustained; and that, in measuring those damages, the interest of the defendant in the pledge at the time of the conversion is to be taken into the account. It follows that the amount is merely nominal, and therefore that the verdict for the plaintiff should stand, with damages 40s.

WILLIAMS, J. I agree with the rest of the court that there was sufficient proof of a conversion; for, although the mere sale of the goods (according to *The Lancashire Waggon Company v. Fitzhugh*, 6 Hurlst. & N. 502) would have been insufficient, yet I think the handing over

of the dock-warrant to the vendees before the time had arrived at which the brandies could be properly sold, according to the terms on which they were pledged, constituted a conversion, inasmuch as it was tantamount to a delivery. Not that the warrant is to be considered in the light of a symbol, according to the doctrine applied to cases of donations *mortis causa*; it is the means of coming at the possession of a thing which will not admit of *corporal delivery*. *Ward v. Turner*, 2 Ves. Sen. 431; *Smith v. Smith*, 2 Stra. 295.

But I cannot agree with my Lord and my learned Brothers as to the other point; for I think the damages ought to stand for the full value of the brandies. The general rule is indisputable, that the measure of damages in trover is the value of the property at the time of the conversion. To this rule there are admitted exceptions. There is the well-known case of a redelivery of the goods before action brought, which, though it cannot cure the conversion, yet will go in mitigation of damages. Another exception is to be found in cases where the plaintiff has only a partial interest in the thing converted. Thus, if one of several joint-tenants or tenants in common alone brings an action against a stranger, he can recover only the value of his share. So, if the plaintiff, though solely entitled to the possession of the thing converted, is entitled to an interest limited in duration, he can only recover damages proportionate to such limited interest, in an action against the person entitled to the residue of the property (though he may recover the full value in an action against a stranger). The case of *Brierly v. Kendall*, which my Lord has cited, is an example of this exception. There, the goods had been assigned by the plaintiff to the defendant by a deed the terms of which operated as a re-demise, and, since the defendant's quasi estate in remainder was not destroyed or forfeited by his conversion of the quasi particular estate, the plaintiff, as owner of that estate, was only entitled to recover damages in proportion to the value of it.

With respect, however, to liens, the rule, I apprehend, is well established, that, if a man having a lien on goods abuses it by wrongfully parting with them, the lien is annihilated, and the owner's right to possession revives, and he may recover their value in damages in an action of trover. With reference to this doctrine, it may be useful to refer to Story on Bailments. In § 325, that writer says: "The doctrine of the common law now established in England, after some diversity of opinion, is, that a factor having a lien on goods for advances or for a general balance, has no right to pledge the goods, and that, if he does pledge them, he conveys no title to the pledgee. The effect of this doctrine is, in England, to deny to the pledgee any right in such a case to retain the goods even for the advances or balance due to the factor. In short, the transfer is deemed wholly tortious; so that the principal may sue for and recover the pledge, without making any allowance or deduction whatever for the debts due by him to the factor." After stating that the English legislature had at length interfered, the

learned author continues, in § 326, — “In America, the general doctrine that a factor cannot pledge the goods of his principal, has been repeatedly recognized. But it does not appear as yet to have been carried to the extent of declaring the pledge altogether a tortious proceeding, so that the title is not good in the pledgee even to the extent of the lien of the factor, or so that the principal may maintain an action against the pledgee without discharging the lien, or at least giving the pledgee *a right to recover the amount of the lien in the damages.*” But, in the 6th edition, by Mr. Bennett, it is added, — “Later decisions have, however, fully settled the law, that a pledge by a factor of his principal’s goods is wholly tortious, and the owner may recover the whole value of the pledgee, *without any deduction or recoupment for his claim against the factor.*” And I may mention that I have reason to believe this rule as to liens was acted upon a few days ago in the Court of Queen’s Bench. *Siebel v. Springfield*, 9 Law T. N. S. 325.

But it is said that the maintenance of such a rule in respect of pledges is inconsistent with *Chinery v. Viall*, mentioned by my Lord. It seems to me, however, that the decision of that case does not interfere with the general rule as to damages in trover, but only establishes a further exception in the peculiar and somewhat anomalous case of an unpaid vendor, whose right in all cases has been deemed to exceed a lien : see Blackburn on Contracts, p. 320. I cannot, however, think that this exception can be properly extended to the case of a pledgee. An unpaid vendor has rights independent of and antecedent to his lien for the purchase-money. But the property of a pledge is a mere creature of the transaction of bailment ; and, if the bailment is terminated, must surely perish with it. Accordingly, it is said in Story on Bailments, § 327, — “It has been intimated that there is, or may be, a distinction favorable to the pledgee, which does not apply, or may not apply, to a factor, since the latter has but a lien, whereas the former has a special property in the goods. It is not very easy to point out any substantial distinction between the case of a pledgee and the case of a factor. The latter holds the goods of his principal as a security and pledge for his advances and other dues. He has a special property in them, and may maintain an action for any violation of this possession, either by the principal or by a stranger. And he is generally treated, in judicial discussions, as in the condition of a pledgee.” Again, in § 299, “As possession is necessary to complete the title by pledge, so, by the common law, the positive loss or the delivery back of the possession of the thing with the consent of the pledgee, *terminates his title.*” And, further, in the same section, — “If the pledgee voluntarily, by his own act, places the pledge beyond his own power, as by agreeing that it may be attached at the suit of a third person, that will amount to a waiver of his pledge.” See *Whitaker v. Sumner*, 20 Pick. R. 399.

It should seem, then, that the bailment in the present case was terminated by the sale before the stipulated time ; and, consequently, that the title of the plaintiff to the goods became as free as if the bailment

had never taken place. If he had brought an action against an innocent vendee, the passage I have already cited from Story, § 325, demonstrates that he might have recovered the absolute value of the goods as damages. Why should he be in a worse condition in respect of an action against the pledgee who has violated the contract of pledge?

The true doctrine, as it seems to me is, that, whenever the plaintiff could have resumed the property, if he could lay his hands on it, and could have rightfully held it when recovered as the full and absolute owner, he is entitled to recover the value of it as damages in the action of trover, which stands in the place of such resumption.

In the present case, I think it plain that the bailment having been terminated by the wrongful sale, the plaintiff might have resumed possession of the goods freed from the bailment, and might have held them rightfully when so resumed, as the absolute owner, against all the world. And I therefore think he ought to recover the full value of them in this action.

Nor can I see any injustice in the defendant's being thus remitted to his unsecured debt, because his lien has been forfeited by his own violation of the conditions on which it was created.

Rule absolute to reduce the damages to 40s.

DONALD v. SUCKLING.

QUEEN'S BENCH. 1866.

[Reported L. R. 1 Q. B. 585.]

DECLARATION. That the defendant detained from the plaintiff his securities for money,—that is to say, four debentures of the British Slate Company, Limited, for £200 each, — and the plaintiff claimed a return of the securities or their value, and £1,000 for their detention.

Plea. That before the alleged detention, the plaintiff deposited the debentures with one J. A. Simpson, as security for the due payment at maturity of a bill of exchange, dated 25th August, 1864, payable six months after date, and drawn by the plaintiff, and accepted by T. Sanders, and endorsed by the plaintiff to and discounted by Simpson, and upon the agreement then come to between the plaintiff and Simpson, that Simpson should have full power to sell or otherwise dispose of the debentures if the bill was not paid when it became due. That the bill had not been paid by the plaintiff nor by any other person, but was dishonored; nor was it paid at the time of the said detention or at the commencement of this suit; and that before the alleged detention and the commencement of this suit Simpson deposited the debentures with the defendant to be by him kept as a security for and until the repayment by Simpson to the defendant of certain sums of money advanced and lent by the defendant to Simpson upon the security

of the debentures, and the defendant had and received the same for the purpose and on the terms aforesaid, which sums of money thence hitherto have been and remain wholly due and unpaid to the defendant; wherefore the defendant detained and still detains the debentures, which is the alleged detention.

Demurrer and joinder.

Harington, for the plaintiff.

Gray, Q. C. (*Gadsden* with him), for the defendant.

July 7. The following judgments were delivered:—

SHEE, J. [After stating the pleadings.] This plea sets up a right to detain the debentures, founded on a bailment of pawn by the plaintiff to Simpson, under which Simpson, if the bill should not be paid, had a right to sell the debentures, paying the overplus above the amount of the bill and charges to the plaintiff,—that is, to sell on the plaintiff's account and for his and Simpson's benefit,—and a repawn of them by Simpson as a security for a loan to him by the defendant.

It must be taken against the defendant that the debentures were pledged to him by Simpson before the plaintiff had made default; it must be taken, too, that the advance for which the debentures were pledged to the defendant by Simpson was of a greater amount than the debt for which Simpson held them; it is consistent with the facts pleaded, either that it was repayable before or repayable after the maturity of the plaintiff's bill, and that the debentures were pledged by Simpson, along with other securities, from which they could not at Simpson's pleasure, or on tender by the plaintiff of the sum for which they had been pledged to Simpson, be detached; and therefore that Simpson had put it out of his power to apply them by sale or otherwise to the only purpose for which possession of them had been given to him; viz., to secure the payment of his debt and the release of the plaintiff, by the sale of them, from liability on the bill which Simpson had discounted for him.

Whether this pledge to the defendant by Simpson was such a conversion by him of the debentures as destroyed his right of possession in them, and revested the plaintiff's right to the possession of them freed from the original bailment, is the question for our decision.

The contention that a pawnee is entitled to exercise over the chattel pawned to him a power so extensive as the one which this plea sets up, was before the case of *Johnson v. Stear*, 15 C. B. N. S. 330; 33 L. J. C. P. 130, if it be not now, wholly unsupported by authority.

A pawn is defined by Sir William Jones (*On Bailments*, pp. 118, 36) to be "a bailment of goods by a debtor to his creditor, to be kept by him till his debt is discharged;" and by Lord Holt (*Coggs v. Bernard*, 2 Ld. Raym. 913), to be "a delivery to another of goods or chattels to be security to him for money borrowed of him by the bailor;" and by Lord Stair (*Institutions of the Law of Scotland*, b. i. tit. 13, s. 11), "a kind of mandate whereby the debtor for his creditor's security gives him the pawn or thing impignorated, to detain or keep it for his own

security, or in the case of not-payment of the debt, to sell the pledge and pay himself out of the price, and restore the rest, or restore the pledge itself on payment of the debt; all which is of the nature of a mandate, and it hath not only a custody in it, but the power to dispone in the case of not-payment;" and by Bell (Principles of the Law of Scotland, ss. 1362, 1363; 4th ed. p. 512), "a real right or *jus in re*, inferior to property, which vests in the holder a power over the subject to retain it in security of the debt for which it is pledged, and qualifies so far and retains the right of property in the pledger or owner."

In the Roman civil law, as in our own law (see *Pigot v. Cubley*, 15 C. B. N. S. 701; 33 L. J. 134), the bailment of pawn implied what in this bailment is expressed, a mandate of sale on default of payment. Without it, or without, as in the Scotch and French law, a right to have a pledge sold judically for payment on default made, the security by way of pledge would be of little value. The pawnee is said by Lord Coke, in his Commentaries on Littleton (Co. Litt. 89 a), to have a "property;" and in *Southcote's Case*, 4 Rep. 83 b, to have a "property in, and not a custody only," of the chattel pawned; by which Lord Holt (2 Ld. Raym. 916, 917) understands Lord Coke to mean a "special property," consisting in this, "that the pawn is a security to the pawnee that he shall be repaid his debt, and to compel the pawnor to pay him;" or, in the words of Fleming, C. J. in *Ratcliff v. Davis*, Cro. Jac. 245: "a special property in the goods to detain them for his (the pawnee's) security;" that is, not a property properly so called, but the *jus in re*, that is, *in re aliena*, of the Roman lawyers; the opposite, as Mr. Austin says (Lectures on Jurisprudence: Tables and Notes, iii. 192), to property; but a right of possession against the true owner, and under a contract with him until his debt is paid, and a power of sale for the reciprocal benefit of the pawnee and pawnor on default of payment at the time agreed upon.

Mr. Justice Story says (On Bailments, s. 324), that "the pawnee may by the common law deliver the pawn into the hands of a stranger without consideration, for safe custody, or convey the same interest conditionally by way of pawn to another person, without destroying or invalidating his security, but that he cannot pledge it for a debt greater than his own; that if he do so he will be guilty of a breach of trust, by which his creditor will acquire no title beyond that of the pawnee; and that the only question which admits of controversy is, whether the creditor shall be entitled to retain the pledge until the original debt (that is, the debt due to the first pawnee) is discharged, or whether the owner may recover the pledge in the same manner as if the case was a naked tort without any qualified right in the first pawnee." So much of this passage as is stated to be clear law; viz. that the pawnee may deliver the chattel pawned to a stranger for safe custody without consideration, or convey the same conditionally (*i. e.*, it may be presumed, on the same conditions as those on which he holds it) by way of pawn to another person for a debt not greater than his own, without destroying or invali-

dating his security, has no application to the case before us, inasmuch as the pawn by Simpson to the defendant was not for safe custody, nor without consideration, nor conditionally, nor for a debt not greater than the debt due by the plaintiff to Simpson, and because the power given to the pawnee by this bailment to dispose of the debentures by sale *or otherwise*, should his debt not be paid, might probably be considered, at least after default made, to enlarge the ordinary right of a pawnee over the chattel pawned. There is nothing in the passage which affords any countenance, except by way of query, to the position that a pawnee who, as in this case, has placed the chattel pawned out of the pawnor's power, and out of his own power, to redeem it by payment of the amount for which it was given to him as a security, and who has deprived himself of the power of selling it for the payment of the pawnor's debt, can by so doing shield the creditor to whom he repawns it from an action of detinue at the suit of the real owner. Mr. Justice Story, indeed, says (On Bailments, s. 299), "that if the pledgee voluntarily and by his own act places the pledge beyond his power to restore it, — as by agreeing that it may be attached at the suit of a third person, — that will amount to a waiver of the pledge." It would be difficult to reconcile any other rule in respect of the pledging by pledges of the chattels pawned to them with the well-established doctrine of our courts and the courts of the United States of America in respect of the pledging by factors of the goods entrusted to them. Factors, like pledgees, have a mandate of sale, — sale irrespectively of default of any kind is the object of the bailment to them; they have a special property and right of possession against all the world except their principal, and against him if they have made advances on the security of his goods entrusted to them; to give effect to that security they may avail themselves of their mandate of sale; but if they place the goods out of their own power by pledging them, although it be for a debt not exceeding their advances, the pawnee from them (except under the Factors Acts) is defenceless, in trover or in detinue, even to the extent of his loan, against the true owner.

Why it should be otherwise between the true owner and the pawnee from a pawnee of the true owner's goods, no reason was adduced during the argument before us, nor indeed was it possible to abduce any reason, seeing that in all the decisions on pledges by factors the relation between a factor who has made advances on the goods entrusted to him and his principal has been held not distinguishable, or barely distinguishable, in its legal incidents from the relation between pawnee and pawnor; a factor being, as Mr. Justice Story says, "generally treated in juridical discussions as in the condition of a pledgee." (On Bailments, ss. 325, 327; citing *Daubigny v. Duval*, 5 T. R. 604; *M'Combie v. Davies*, 7 East, 5.)

The case of *Johnson v. Stear*, 15 C. B. N. S. 330; 33 L. J. C. P. 130, is a clear authority for holding that Simpson, in dealing with the debentures in the way which he must be taken on this plea to have done, was, as the defendant also was, guilty of a conversion of them; and

unless that case is also an authority binding upon us for the doctrine that the conversion by a pawnee of the thing pawned is not such an abuse of the bailment of pawn as annuls it, but that there remains in him, and in an assignee from him, and in an assignee from his assignee, and so on *toties quoties*, without limit as to the number of assignments or the consideration for them, an interest of property in the pawn which defeats the owner's right of possession, the plaintiff is entitled to our judgment.

As I read the case of *Johnson v. Stear*, 15 C. B. N. S. 330; 33 L. J. C. P. 130, and the case of *Chinery v. Viall*, 5 H. & N. 288; 29 L. J. Ex. 180, and *Brierly v. Kendall*, 17 Q. B. 937; 21 L. J. Q. B. 161, on the authority of which it proceeded, the judgments of the majority of the learned judges of the Court of Common Pleas, in the first of them, and the judgments of the Court of Exchequer, and of the Court of Queen's Bench, in the second and the third, are based on the principle that, in an action to recover damages for a conversion, it is not an inflexible rule of law that the value of the goods converted is to be taken as the measure of damages; that when a suitor's real cause of action is a breach of contract he cannot by suing in tort entitle himself to a larger compensation than he could have recovered in an action in form *ex contractu*; and therefore that when a verdict is obtained against an unpaid vendor for the conversion of the thing sold by him, or against an unpaid pawnee for the conversion of the thing pledged to him, he is entitled to be credited, in the estimate by the jury, of the damages to be paid by him for the value of such interest or advantage as would have resulted to him from the contract of sale or the contract of pawn if it had been fulfilled by the vendee or pawnor.

That this was the *ratio decidendi* in these cases seems to me clear from the facts of *Chinery v. Viall*, and *Brierly v. Kendall*, which raised no question between the litigant parties in any respect analogous to the question which we in this case have to decide. In *Chinery v. Viall*, the plaintiff, who was the vendee of forty-eight sheep, for five only of which he had paid, under a bargain which entitled him to delivery of the whole lot before payment, brought his action against the vendor for a conversion by parting with the sheep to another purchaser. If the defendant's interest in the unpaid balance of the agreed price of the sheep had not been credited to him in the amount of damages, the plaintiff, who had only paid for five of them, would have pocketed the full value of the forty-three which had been converted.

In *Brierly v. Kendall*, an action of trespass, there was a loan of the defendant to the plaintiff secured by bill of sale of the plaintiff's goods, in which was a reservation to the plaintiff of a right to the possession of the goods until he should make default in some payment. Before any default the defendant took the goods from the plaintiff and sold them. For this wrong he was liable in trespass; but the measure of damages was held to be, not the value of the goods, but the loss which the plaintiff had really sustained by being deprived of the possession.

The wrongful act of the defendant did not annihilate his interest in the goods under the bill of sale ; and such interest was considered in measuring the extent of the plaintiff's right to damages.

These cases are manifestly not in conflict with, if indeed they at all touch, the principle relied upon against the plea which is here demurred to, that if the pawnee converts the chattels pawned to him, the bailment is determined and the right of possession revested in the true owner of them.

In *Johnson v. Stear*, the defendant, a pawnee of dock warrants, had anticipated by a few hours only the time at which, under his contract with the owner of them, he might have sold and delivered them ; he had applied before the time of action brought the proceeds of their sale to the discharge of the plaintiff's debt to him, or he held them specially applicable to that purpose, and the plaintiff, had he sued the defendant in contract for not keeping the pledge until default made, could not have proved that he had sustained any damage. The Chief Justice, speaking for himself and two of his learned brothers, did indeed say, that "the deposit of the goods in question with the defendant to secure repayment of a loan to him on a given day, with a power to sell in case of default on that day, created an interest and a right of property in the goods which was more than a mere lien ; and the wrongful act of the pawnee did not annihilate the contract between the parties nor the interest of the pawnee in the goods under that contract" (15 C. B. N. S. 334, 335 ; 33 L. J. C. P. 131) ; but he cannot be understood to have meant by the words "interest and right of property in the goods," and by the words "more than a mere lien" other than "a special property," as defined by the authorities before referred to by me ; viz., a real right or *jus in re*, a right of possession until default made, a right of retention or sale after default made ; nor, as I think, to have intended more by the words "the wrongful act of the pawnee did not annihilate the contract between the parties," than that the contract, in the breach of which consisted the tort of which the plaintiff complained, must still be considered to subsist, at least for the purpose of being referred to for the measure of the damage sustained by the pawnor and the damages to be recovered by him.

The case before us differs, as I think, in essential particulars, as respects the principle upon which damages would have been measurable, had the action been in trover, from the case in the Common Pleas. The defendant, as assignee of the pawnee, could not surely have set up in mitigation of damages an interest derived by him from the pawnee before default made by the pawnor ; the pawnee, by the express terms of the bailment to him, not having the right to dispose of the debentures by sale or otherwise until after default made. Besides, it is impossible to shut one's eyes to the broad distinction between the case of the sale a few hours too soon of a pawn which, as in the case of *Johnson v. Stear*, the pawnor "had no intention to redeem," — the proceeds of the sale being devoted before action brought to discharge of

the debt for which the pawn had been given as a security, — and the abuse of a pawn by the pawnee in wrongfully, for his own purposes, placing out of his power, and out of the pawnor's power, to redeem the pawn should he have the means to do so.

By the contract of bailment between the plaintiff and Simpson the proceeds of the sale of the debentures, which are the subject of this suit, had been specifically appropriated to the payment of the plaintiff's bill in the event of his not being able to meet it with other means. Simpson held the debentures in trust, should the bill not be paid, to sell them on the plaintiff's account, or allow the plaintiff to sell them or raise money on them to pay his bill. Instead of that, Simpson, before default made by the plaintiff, converted them to his own use, obtaining their agreed value in pledge from the defendant, and imposing upon the plaintiff the burthen of making other provision to meet his bill. By this act of Simpson the plaintiff, in my judgment, did in fact sustain damage, and at the maturity of the bill, if not before, to the full amount of the current salable value of the debentures. I am at a loss to see how the conduct of Simpson in thus dealing with the debentures, and how the title of the defendant, claiming under him, are to escape the operation of the rule that if the pawnee, except conditionally (an exception for which the authority is but slender), parts with the possession of the pawn, he loses the benefit of his security (*Ryall v. Rolle*, 1 Atk. 165; *Reeves v. Capper*, 5 Bing. N. C. 136; *Johnson v. Stear*, 15 C. B. N. S. 330; 33 L. J. C. P. 130, per Williams, J.); or the operation of the maxim *nemo plus juris ad alium transferre potest quam ipse habet*.

For these reasons, as it seems to me, the case of *Johnson v. Stear* ought not to govern our decision. It could not be followed by us as an authority in favor of the defendant without inattention to its true principle; viz., that between the parties to a contract the measure of damages for a breach of the contract must be the same, whether the form of action be *ex contractu* or *ex delicto*; and that in such a case, general rules applicable to the latter form, the only one competent for the redress of injuries purely tortious, are not to be strained to the doing of manifest injustice. It is open also, in a right estimate of it as an authority for the case in hand, to this observation: the interest of a plaintiff in the damages recoverable by him for a tort, which is in its true nature a breach of contract, is restricted by the implied stipulations of the contracting parties to the amount which, in the conscience of a jury, may suffice to give him an adequate compensation. The action of detinue for a chattel, of which the bailment has been abused, against a person not party to the contract of bailment, is not based upon a breach of contract, and not within the rules applicable to actions of tort which are based on breaches of contract. In detinue the plaintiff sues, not for the value tantamount of the thing detained from him, but for the return of the thing itself, which may to him have a value other and higher than its actual value; and only for its value if the thing can-

not be delivered to him (Tidd's Forms, 8th ed. 339), and for damages for its detention and his costs of suit. A judgment to recover the value only has been reversed for error (*Peters v. Heyward*, Cro. Jac. 682); the integral undiminished thing itself, unaffected by countervailing lien or abatement of whatever kind, being the primary object of the suit. In an action of trover for the conversion by the pawnee of the subject of the bailment, the plaintiff, according to the judgment of the majority of the court in *Johnson v. Stear*, is entitled only to recover the amount, in money, of the damage which he proves himself to have sustained; in an action of detinue for the recovery from the assignee of the pawnee of the chattel pawned, and of which the pawn has been abused and forfeited, the plaintiff is entitled to recover the chattel itself, because it was a term of the contract of pawn that if the pawn should be abused by the pawnee his right to the possession of it should cease; and the defendant can have derived no right of possession from one whose own right of possession was determined by his attempt to transfer it.

Unless, therefore, we were prepared to hold, in disregard of the clearly expressed opinion of Story and Mr. Justice Williams, that detinue can in no case lie for an unredeemed pawn, however much the bailment of it may have been abused, we are not at liberty to apply the *ratio decidendi* in *Johnson v. Stear* to the case before us.

It raises a strong presumption against the defence set up in this plea that nothing bearing the slightest resemblance to the right of possession which it claims for the assignee of a pawnee, is to be found in the copious title of the Digest (Dig. lib. xx. tit. 1), "*De pignoribus et hypothecis; et qualiter ea contrahantur, et de pactis eorum*," or in the five following titles of the contract of pawn and hypothec and its incidents, or in the title, "*De pignoratitia actione, vel contra*" (Dig. lib. xiii. tit. 7), or in the works of any English, French, or Scotch jurist.

The *dictum* of the majority of the court in the case of *Mores v. Conham*, Owen, 123, 124, that the pawnee has such an interest in the pawn as he may assign over, was not the point decided in that case; nor, as it seems to me, a point essential to its decision; the point decided being, that the surrender by the plaintiff of a chattel pawned to him by a third person was a good consideration for a promise by the defendant to pay the debt for which it had been given as security. It does not seem to follow from that decision that the surenderee thereby acquired such an interest in the pawn as would enable him to defend an action of detinue at the suit of the true owner, the reunion of whose rights of property and possession was, unless they meant to rob him, the real object of the transaction. The inference drawn from this very obscure and superficially reasoned case in favor of the defendant's plea is wholly irreconcilable with the doctrine of Domat, the highest authority on all questions depending, as this question does, upon the rules and principles of the Roman civil law, that the bailments of "*hypothèque*" and "*gage*" last only as long as the thing hypothecated is in the hands of the person charging it, or the thing pawned in the hands of him who

takes it for his security (Domat, Lois Civiles, liv. iii. tit. 1, s. 1); and with the doctrine of Erskine, a jurist of nearly equal eminence, that “in a pledge of moveables the creditor who quits the possession of the subject loses the *real right* he had upon it.” Institute of the Laws of Scotland, b. iii. tit. 1, s. 33.

I think that the bailment to Simpson was determined by the pledge by him to the defendant under the circumstances stated in the plea; that both of them have been guilty of a conversion; that the plaintiff might (as Mr. Justice Williams said in the case of *Johnson v. Stear*, 15 C. B. N. S. 341; 33 L. J. C. P. 134) lawfully, should the opportunity offer, resume the possession of the debentures, and hold them freed from the bailment; and may—the defendant being remitted to his remedy against Simpson, and Simpson to his remedy upon the bill—recover them, or their full value, if they cannot be delivered to him, in this action of detinue.

BLACKBURN, J. [After stating the pleadings.] The plea does not expressly state whether the deposit with the defendant by Simpson was before or after the dishonor of the bill of exchange; and as against the defendant, in whose knowledge this matter lies, it must be taken that it was before the bill was dishonored, and consequently at a time when Simpson was not yet entitled by virtue of his agreement with the plaintiff to dispose of the debentures. We cannot construe the plea as stating that Simpson agreed to transfer to the defendant, as indorsee of the bill, the security which Simpson had over the debentures, and no more. We must, I think, as against the defendant, construe the plea as stating that Simpson deposited the debentures, professing to give a security on them for repayment of a debt of his own, which may or may not have exceeded the amount of the bill of exchange, but was certainly different from it. And it is quite clear that Simpson could not give the defendant any right to detain the debentures after the bill of exchange was satisfied, so that a replication that the plaintiff had paid, or was ready and willing to pay, the bill would have been good. The defendant could not in any view have a greater right than Simpson had. But there is no such replication; and so the question which is raised on this record, and it is a very important one, is, whether the plaintiff is entitled to recover in detinue the possession of the debentures, he neither having paid nor tendered the amount for which he had pledged them with Simpson. In detinue the plaintiff's claim is based on his right to have the chattel itself delivered to him; and if there still remain in Simpson or in the defendant as his assignee, any interest in the goods, or any right of detention inconsistent with this right in the plaintiff, the plaintiff must fail in detinue, though he may be entitled to maintain an action of tort against Simpson or the defendant for the damage, if any, sustained by him in consequence of their unauthorized dealing with the debentures.

The question, therefore, raised on the present demurrer is, whether the deposit by Simpson of the debentures with the defendant, as stated

in the plea, put an end to that interest and right of detention till the bill of exchange was honored which had been given to Simpson by the plaintiff's original contract of pledge with him.

There is a great difference in this respect between a pledge and a lien. The authorities are clear that a right of lien, properly so called, is a mere personal right of detention ; and that an unauthorized transfer of the thing does not transfer that personal right. The cases which established that, before the Factors Acts, a pledge by a factor gave his pledgee no right to retain the goods, even to the extent to which the factor was in advance, proceed on this ground. In *Daubigny v. Duval*, 5 T. R. 606, Buller, J., puts the case on the ground that "a lien is a personal right and cannot be transferred to another." In *M'Combie v. Davies*, 7 East, 6, Lord Ellenborough puts the decision of the court on the same ground, saying that "nothing could be clearer than that liens were personal and could not be transferred to third persons by any tortious pledge of the principal's goods." Story, in his *Treatise on Bailments*, ss. 325-327, is apparently dissatisfied with these decisions, thinking that a factor, who has made advances on the goods consigned to him, ought to be considered as having more than a mere personal right to detain the goods, and that a pledgee from him ought to have been considered entitled to detain the goods until the lien of the factor was discharged. This is a question which can never be raised in this country, for the legislature has intervened, and in all cases of pledges by agents, within the Factors Acts, the pledge is now available to the extent of the factor's interest.

But on the facts stated on the plea, Simpson was not an agent within the meaning of the Factors Acts ; and we have to consider whether the agreement stated to have been made between the plaintiff and him did confer something beyond a mere lien properly so called, an interest in the property, or real right, as distinguished from a mere personal right of detention. I think that both in principle and on authority a contract such as that stated in the plea — pledging goods as a security, and giving the pledgee power in case of default to dispose of the pledge (when accompanied by an actual delivery of the thing) — does give the pledgee something beyond a mere lien ; it creates in him a special property or interest in the thing. By the civil law such a contract did so, though there was no actual delivery of possession ; but the right of hypothec is not recognized by the common law. Till possession is given, the intended pledgee has only a right of action on the contract, and no interest in the thing itself. *Howes v. Ball*, 7 B. & C. 481. I mention this because in the argument several authorities, which only go to show that a delivery of possession is, according to the English law, necessary for the creation of the special property of the pawnee, were cited as if they determined that possession was necessary for the continuance of that property.

The effect of the civil law is thus stated by Story, in his *Treatise on Bailments*, s. 328 : "It enabled the pawnee to assign over, or to pledge

the goods again, to the extent of his interest or lien on them; and in either case the transferee was entitled to hold the pawn until the original owner discharged the debt for which it was pledged. But beyond this the (second) pledge was inoperative and conveyed no title, according to the known maxim, *nemo plus juris ad alium transferre potest quam ipse habet*."

In England there are strong authorities that the contract of pledge, when perfected by delivery of possession, creates an interest in the pledge, which interest may be assigned. This was the very point decided by the court in *Mores v. Conham*, Owen, 123, 124, where the court say that the pawnee is responsible "if he misuseth the pawn; also he hath such interest in the pawn as he may assign over, and the assignee shall be subject to detain it if he detains it upon payment of the money by the owner." It is true that one judge, Foster, J., dissented on this very point. That may so far weaken the authority of the decision; but it shows that there could be no mistake in the reporter, and no oversight on the part of the majority, but that it was a deliberate decision.

It is laid down by Lord Holt, in his celebrated judgment in *Coggs v. Bernard*, 2 Ld. Raym. 916, that a pawnee "has a special property, for the pawn is a securing to the pawnee that he shall be repaid his debt, and to compel the pawnor to pay him," language certainly seeming to indicate an opinion that he has an interest in the thing, or real right, as distinguished from a mere personal right of detention. And Story, in his Treatise on Bailments, s. 327, says: "But whatever doubt may be indulged as to the case of a factor, it has been decided" — that is, in America — "that in case of a strict pledge, if the pledgee transfers the same to his own creditor, the latter may hold the pledge until the debt of the original owner is discharged."

In Whitaker on Lien, published in 1812, p. 140, the law is laid down to be, that the pawnee has a special property beyond a lien. I do not cite this as an authority of great weight, but as showing that this was an existing opinion in England before Story wrote his treatise. But there is a class of cases in which a person having a limited interest in chattels, either as hirer or lessee of them, dealing tortiously with them, has been held to determine his special interest in the things, so that the owner may maintain trover as if that interest had never been created. But I think in all these cases the act done by the party having the limited interest was wholly inconsistent with the contract under which he had the limited interest; so that it must be taken from his doing it that he had renounced the contract, which, as was said in *Fenn v. Bittleston*, 7 Ex. 160; 21 L. J. Ex. 43, operates as a disclaimer of a tenancy at common law; or, as it is put by Williams, J., in *Johnson v. Stear*, 15 C. B. N. S. 330, 341; 33 L. J. C. P. 130, 134, he may be said to have violated an implied condition of the bailment. Such is the case where a hirer of goods, who is not to have more than the use of them, destroys them or sells them; that being so wholly at variance with the purpose for which

he holds them, that it may well be said that he has renounced the contract by which he held them, and so waived and abandoned the limited right which he had under that contract. It may be a question whether it would not have been better if it had been originally determined that, even in such cases, the owner should bring a special action on the case and recover the damage which he actually sustained, which may in such cases be very trifling, though it may be large, instead of holding that he might bring trover, and recover the whole value of the chattel without any allowance for the special property. But I am not prepared to dissent from these cases, where the act complained of is one wholly repugnant to the holding, as I think it will be found to have been in every one of the cases in which this doctrine has been acted upon. But where the act, though unauthorized, is not so repugnant to the contract as to show a disclaimer, the law is otherwise. Thus, where the hirer of a horse for two days to ride from Gravesend to Nettlested deviated from the straight way and rode elsewhere, it was held that the hirer had a good special property for the two days, and although he misbehaved by riding to another place than was intended, that was to be punished by an action on the case, and not by seizing the gelding. *Lee v. Atkinson*, Yelv. 172. This certainly was a much more equitable decision than if a rough rule had been laid down that every deviation from the right line, however small, was to operate as a forfeiture of the right to use the horse for which the hirer had paid; and it may be reconciled to the decisions already referred to, because the wrongful use, though wrongful, was not such as to show a renunciation of the contract with the owner of the horse. Now, I think that the sub-pledging of goods held in security for money, before the money is due, is not in general so inconsistent with the contract as to amount to a renunciation of that contract. There may be cases in which the pledgor has a special personal confidence in the pawnee, and therefore stipulates that the pledge shall be kept by him alone, but no such terms are stated here, and I do not think that any such term is implied by law. In general, all that the pledgor requires is the personal contract of the pledgee that on bringing the money the pawn shall be given up to him, and that in the meantime the pledgee shall be responsible for due care being taken for its safe custody. This may very well be done though there has been a sub pledge; at least the plaintiff should try the experiment whether, on bringing the money for which he pledged those debentures to Simpson, he cannot get them. And the assignment of the pawn for the purpose of raising money (so long at least as it purports to transfer no more than the pledgee's interest against the pledgor) is so far from being found in practice to be inconsistent with, or repugnant to, the contract, that it has been introduced into the Factors Acts, and is in the civil law (and according to *Mores v. Conham*, Owen, 123, in our own law also) a regular incident in a pledge. If it is done too soon, or to too great an extent, it is doubtless unlawful, but not so repugnant to the contract as to be justly held equivalent to a renunciation of it.

The cases of *Bloxam v. Sanders*, 4 B. & C. 941, and *Milgate v. Kebble*, 3 M. & G. 100, are cases of unpaid vendors, and therefore are not authorities directly applicable to a case of pledge. But the position of a partially unpaid vendor, who irregularly sells the goods which have only been partially paid for, is very analogous to that of a pledgee; and in *Milgate v. Kebble*, Id. 103, Tindal, C. J., is reported to have used language that seems to indicate that in his opinion a pledgor could not have maintained trover any more than the vendee in that case.

But the latest case, and one which I think is binding on this court, is that of *Johnson v. Stear*, 15 C. B. N. S. 330; 33 L. J. C. P. 130; and I think that the decision of the majority of the Court of Common Pleas in that case is an authority that at all events there remains in the pawnee an interest not put an end to by the unauthorized transfer, such as is inconsistent with a right in the pawnor to recover in detainue. In that case the goods had been pledged as a security for a bill of exchange, with a power of sale if the bill was not paid at maturity. The pledgee sold the goods the *day before* he had a right to do so. The assignees of the bankrupt pledgor brought trover, and sought to recover the full value of the goods without any reduction. Williams, J., thought that they were so entitled, giving as his reason "that the bailment having been terminated by the wrongful sale, the plaintiff might have resumed possession of the goods freed from the bailment, and might have held them rightfully when so resumed, as the absolute owner against all the world." 15 C. B. N. S. 341; 33 L. J. C. P. 134. And if this was correct, the present plaintiff is entitled to judgment. But the majority of the court decided that "the deposit of the goods in question with the defendant, to secure repayment of a loan to him on a given day, with power to sell in case of default on that day, created an interest and a right of property in the goods which was *more* than a mere lien; and the wrongful act of the pawnee did not annihilate the contract between the parties, *nor the interest* of the pawnee in the goods under that contract." 15 C. B. N. S. 334, 335; 33 L. J. C. P. 131. This can be reconciled with the cases above cited, of which *Fenn v. Bittleston*, 7 Ex. 152; 21 L. J. Ex. 41, is one, by the distinction that the sale, though wrongful, was not so inconsistent with the object of the contract of pledge as to amount to a repudiation of it, though I own that I do not find this distinction in the judgment of *Johnson v. Stear*, 15 C. B. N. S. 330; 33 L. J. C. P. 130. It may be that the conclusion from these premises ought to have been that the defendant was entitled to the verdict, on the plea of not possessed in trover, unless the court thought fit to let the plaintiff, on proper terms, amend by substituting a count for the improper sale; but this point as to the pleading does not seem to have been presented to the Court of Common Pleas. The fact that they differed from Williams, J., shows that after consideration they *meant* to decide that the pledge gave a special property, which still continued; and though I have the highest respect for the authority of Williams, J., I think we must, in a court of co-ordinate jurisdiction,

act upon the opinion of the majority, even if I did not think, as I do, that it puts the law on a just and convenient ground. And as already intimated, I think that unless the plaintiff is entitled to the uncontrolled possession of the things, he cannot recover in detinue.

For these reasons, I think we should give judgment for the defendant.¹

Keighley and Gething, for the plaintiff.

Edmonds and Mayhew, for the defendant.²

HALLIDAY v. HOLGATE.

EXCHEQUER. 1868.

[Reported L. R. 3 Ex. 299.]

APPEAL from the judgment of the Court of Exchequer, discharging a rule to enter a verdict for the plaintiff in an action of trover brought by the creditors' assignee of one Bentley against the defendant to recover the value of certain shares, the defendant pleading, amongst other pleas, not possessed.

On the 30th of April, 1866, Bentley bought of one Scholefield fifteen shares in the Whitewell Mining Company, limited, which, by the articles of association of the company, were not transferable till the 2d of January, 1867, and Scholefield at the same time, by a memorandum in writing, agreed to execute a transfer of the shares to Bentley as soon as he legally could. Bentley at the same time bought ten other shares in the same company, and took a similar memorandum.

In June, 1866, Bentley borrowed of the defendant £350 on his own promissory note payable on demand, and on the security of the twenty-five shares above mentioned, and he at the same time handed to the defendant the two agreements, promising to deliver to him the scrip as soon as he received it. On the 16th of January, 1867, Bentley handed to the defendant the fifteen scrip certificates for the first fifteen shares, and received back the agreement relating to the ten shares, on paying £100 on account of the debt.

On the same day Bentley's firm stopped payment; they were afterwards adjudicated bankrupts, and the plaintiff was appointed creditors' assignee, Bentley absconding before passing his final examination. The defendant, after the bankruptcy, sold the scrip of ten of the fifteen shares, but it did not appear that he had made any demand on, or given notice to, either Bentley or the plaintiff, the assignee. The value of the scrip for the ten shares was admitted to be £200.

The cause was tried before *Mellor, J.*, at the Liverpool Spring

¹ The opinions of COCKBURN, C. J., and MELLOR, J., concurring with BLACKBURN, J., are omitted. — ED.

² *Talty v. Freedman's Savings & Trust Co.*, 93 U. S. 321; *Williams v. Ashe*, 111 Cal. 180, accord. See *Van Arsdale v. Joiner*, 44 Ga. 173. — ED.

Assizes, 1867, and the learned judge nonsuited the plaintiff, reserving leave to him to move to enter a verdict for him for £200, or such other sum as the court should think fit. A rule was obtained accordingly, and was, after argument in the court below, in Hilary Term last, discharged on the authority of *Donald v. Suckling*, Law Rep. 1 Q. B. 585. The plaintiff appealed.

Jordan, for the appellant.

Quain, Q. C. (*Herschell* with him), was not called upon.

The judgment of the court (WILLES, BLACKBURN, KEATING, MONTAGUE SMITH, and LUSH, JJ.) was delivered by

WILLES, J. We are all of opinion that this judgment must be affirmed. The action is brought by an assignee in bankruptcy to recover the value of certain scrip certificates of the bankrupt, alleged to have been converted by the defendant. The defendant was under advances to the bankrupt, in respect of which the bankrupt pledged to the defendant the certificates in question. The bankrupt became in default, and absconded, and the defendant thereupon sold a part of the certificates sufficient to repay the whole or part of the amount due to him. The assignee seeks to recover either the whole value or nominal damages in respect of the wrong done by the sale. As to the claim for the whole value, it is certainly a strong contention. The scrip certificates were in the hands of the defendant as a security for money due, and the assignee has sustained no actual damage, for the debt could have been paid no otherwise, yet the assignee seeks to recover the whole value as if at the time the certificates were his own. It does not require much argument to show that there is no principle for such a rule, and we should not be disposed to act upon it unless we are compelled by some authority to do so. But the authorities invite us to do the reverse, for *Johnson v. Stear*, 15 C. B. (N. S.) 330; 33 L. J. (C. P.) 130 shows that if any action lies at all in such a case, the verdict can only be for nominal damages, and that an allowance must be made for the amount of the debt which has been thus satisfied, that being the amount which the pledgor or his assignee would have had to pay before he could have required the article to be delivered up. We are quite satisfied to abide by that decision.

But it has been argued that the plaintiff is at any rate entitled to nominal damages, for that a conversion was committed by the sale of the certificates. That sale, it is contended, had the effect of putting an end to the bailment of pledge; the property of the pledgee was thereby determined, so as to enable the assignee to say that at the moment when the sale took place he became entitled to the certificates by virtue of the general property which then revested in him. This reasoning proceeds upon a somewhat subtle and narrow ground, for it is admitted that the assignee could only claim nominal damages. But we cannot arrive at the conclusion that he is so entitled without getting rid of the case of *Donald v. Suckling*, Law Rep. 1 Q. B. 585; and so far from feeling disposed to overrule that case, we are satisfied of its good sense,

and think that it puts the whole matter on a plain and intelligible footing. There are three kinds of security: the first, a simple lien; the second, a mortgage, passing the property out and out; the third, a security intermediate between a lien and a mortgage — viz., a pledge — where by contract a deposit of goods is made a security for a debt, and the right to the property vests in the pledgee so far as is necessary to secure the debt. It is true the pledgor has such a property in the article pledged as he can convey to a third person, but he has no right to the goods without paying off the debt, and until the debt is paid off the pledgee has the whole present interest. If he deals with it in a manner other than is allowed by law for the payment of his debt, then, in so far as by disposing of the reversionary interest of the pledgor he causes to the pledgor any difficulty in obtaining possession of the pledge on payment of the sum due, and thereby does him any real damage, he commits a legal wrong against the pledgor. But it is a contradiction in fact, and would be to call a thing that which it is not, to say that the pledgee consents by his act to revest in the pledgor the immediate interest or right in the pledge, which by the bargain is out of the pledgor and in the pledgee. Therefore, for any such wrong an action of trover or of detinue, each of which assumes an immediate right to possession in the plaintiff, is not maintainable, for that right clearly is not in the plaintiff. The judgment must, therefore, be affirmed.

*Judgment affirmed.*¹

¹ *Contra*, *Feige v. Burt*, 118 Mich. 243; *Wilson v. Little*, 2 Comst. 443 (but cf. *Lewis v. Mott*, 36 N. Y. 395); *Neiler v. Kelley*, 69 Pa. St. 403. See *Baltimore Marine Ins. Co. v. Dalrymple*, 25 Md. 269.

"The Massachusetts cases declare that a tender is necessary to enable the pledgor to maintain trover against the pledgee for a conversion of securities, when the lien created by the pledge has not been otherwise discharged. Neither the English nor the Massachusetts cases, however, determine what amounts to a sufficient tender, although there are expressions which indicate that a tender good at common law is required. When replevin or detinue is brought, there may be a substantial reason why there should be an actual tender, because the plaintiff, if he recover judgment, recovers or may recover the possession of the property, and the court might well order the money tendered paid into court before entering such a judgment. There is a technical reason why a formal tender may be held necessary in trover; because, if the lien created by the pledge has not been otherwise discharged, it may be held that it can be discharged only by the payment of the debt, or, if the defendant will not receive payment, by a tender of payment, which is the only thing the common law considers as in any respect an equivalent of payment; and trover can only be maintained when the lien has been discharged, and the plaintiff is entitled to the immediate possession of the property. But as the damages in trover are the value of the property less the amount of the debt, except for this technical reason, a want of a formal tender would not be a greater objection against maintaining trover than against maintaining an action for a breach of the contract to keep the property safely, and to deliver it to the pledgor on payment of the debt. Perhaps in contract, strictly speaking, no breach is shown by a failure to return the security unless the debt is paid or there has been a good common law tender of payment, but there are cases which hold that a formal tender is unnecessary." *FIELD, J.*, in *Cumnock v. Newburyport Savings Inst.*, 142 Mass. 342, 346.

In *Rush v. First Nat. Bank*, 71 Fed. R. 102; *Waring v. Gaskill*, 95 Ga. 731; *Richardson v. Ashby*, 132 Mo. 238; and *Stearns v. Marsh*, 4 Denio, 227, it was held that in

WHIPPLE v. DUTTON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1900.

[Reported 175 Mass. 365.]

TORT, by the assignees in insolvency of the estate of the Beacon Cycle Manufacturing Company, for the conversion of five hundred bicycles. Trial in the Superior Court, without a jury, before *Lilley*, J., who allowed a bill of exceptions, in substance as follows.

During the years 1892 and 1893 the Beacon Cycle Manufacturing Company, a corporation, was engaged in Westborough in the manufacture and sale of bicycles. On June 26, 1893, the corporation entered into an agreement in writing with the defendants, which recited that the corporation had simultaneously delivered to the defendants five hundred "Nomad" bicycles for the purpose of securing money for its use as a corporation, and had executed and delivered therewith its three promissory notes, each for \$4,166.67, of even date, payable in thirty, sixty, and ninety days from date, the amount of the notes being made up by calling each of the bicycles of the value of \$25 each; that if the first note was paid, the defendants should release one third of the five hundred bicycles on being paid \$26 for each bicycle, the amount of the note being payment so far as the bicycles released, but if the note was not paid, then one third of the bicycles should be the absolute property of the defendants; that if the second note was paid, another one third of the bicycles should be released on the payment of \$27 a bicycle; and if the third note was paid, then the remainder of the bicycles should be released on the payment of \$28 each therefor, but if each note was not paid, then such one third of the bicycles should be the absolute property of the defendants; and that the whole number of bicycles might be released at the maturity of the first note "by paying \$26 for the whole number of the five hundred bicycles, the other two notes to be then given up."

The five hundred bicycles were not delivered to the defendants as recited in this agreement, and later the same day the corporation executed the following paper: "This instrument entitles Houghton &

a suit on the pledgor's obligation, the pledgor could claim to have the damages reduced by the value of the securities pledged which had been unlawfully sold, and that he need make no tender of the debt. And, conversely, that the pledgee may recoup the amount of his debt when sued by the pledgor for the conversion of the pledge, was held in *Van Arsdale v. Joiner*, 44 Ga. 173; *Belden v. Perkins*, 78 Ill. 449; *Feige v. Burt*, 118 Mich. 243; *Hallack Lumber Co. v. Gray*, 19 Col. 149.

As to what changes in the property pledged may be lawfully made by the pledgee, see *Day v. Holmes*, 103 Mass. 306; *Fay v. Gray*, 124 Mass. 500.

In most jurisdictions, a distinction is drawn between a pledgee of commercial paper and a pledgee of other personal property. In general the latter can sell on default by and notice to the pledgor; but the former must hold and collect the security as it becomes due. *Richardson v. Ashby*, 132 Mo. 238, 246. — Ed.

Dutton to the delivery to them of five hundred Nomad bicycles, the same being an accepted order for said number of machines to be delivered to them as they may request, as rapidly as one hundred and fifty per week; and this delivery is to be on the terms of our agreement with them dated June 26, 1893, and is hereby made a part thereof; said machines having been paid for in cash and agreements." Wheels to the number of three hundred and forty-four were delivered to the defendants in June and July, 1893, at various times, and as delivered the defendants advanced to or paid the corporation at the rate of \$25 a wheel. The balance of the five hundred wheels was never delivered, and the last of the three notes mentioned in the agreement was not used by the defendants or presented for payment. The corporation did not pay the notes referred to in the agreement at their maturity, and has never paid the same or any part thereof, but on October 7, 1893, was declared insolvent by the court of insolvency for the county of Worcester upon a petition by one of its creditors, and on October 31, 1893, the plaintiffs were duly appointed assignees of the insolvent estate.

On October 12, 1893, the defendants began to sell the bicycles received under the agreements, at private sale and singly or in small lots, and all of them had been sold before June, 1894. The defendants did not serve any notice upon the corporation or upon the plaintiffs of an intention to sell; but the secretary of the corporation knew that sales were being made, and in general as to the price, and there was no evidence that he objected thereto. The sales were made openly at the large establishment of the defendants in Boston; and the bicycles were exhibited in the defendants' windows, where they were seen by an officer of the corporation.

It was not contended that the defendants did not use good judgment and diligence in effecting sales at favorable prices, the plaintiffs contending that the defendants had no right to sell at all.

In September, 1894, before the bringing of the writ, one of the plaintiffs called upon counsel for the defendants, to whom he had been referred by the defendants, and was informed that all the bicycles had been sold by the defendants, and that therefore they could not return them if demanded; and in reply to an inquiry whether a tender would be required, stated that it would do no good to make any demand or tender.

He further stated that upon failure of the corporation to pay its notes, he considered that the bicycles mentioned in the agreement became absolutely the property of the defendants; and that they recognized no rights of the assignees to recover the value of the goods. There was evidence that the bicycles were worth from \$50 to \$80 apiece.

The judge ruled, as requested by the defendants, that the plaintiffs were not entitled to recover, and found for the defendants; and the plaintiffs alleged exceptions.

W. R. Sears, for the plaintiffs.

E. A. Whitman, for the defendants.

MORTON, J. We assume, as the defendants contend, that the transactions of June 26 constituted a pledge of the bicycles received by the defendants, and that the subsequent sales as made by the defendants were unauthorized. But it does not follow that the plaintiffs are entitled to recover the value of the bicycles thus sold. The defendants had possession of the bicycles, and had a lien on them for sums lent to the bicycle company which were overdue and unpaid. They had a right to foreclose the pledge in any manner authorized by law. The plaintiffs contend that they foreclosed in a manner unauthorized by law. But the only effect, it seems to us, of the unauthorized sales by the defendants was to entitle the plaintiffs to recover any damages sustained thereby. The plaintiffs admit in substance that the defendants used good judgment and diligence in selling and that the sales were effected at favorable prices, and it does not appear that the proceeds were more than enough to pay what was due the defendants. Under such circumstances we fail to see how the plaintiffs have sustained any damage. It would be singular if, having a right to foreclose the pledge, the defendants should be held to have lost their lien and to be liable for the value of the bicycles, because, without inflicting any damage thereby on the pledgor, they went the wrong way about the foreclosure, or claimed a greater right than they actually had. We do not think that such is the law. See *Dahill v. Booker*, 140 Mass. 308; *Farrar v. Paine*, 173 Mass. 58 and cases cited; *Halliday v. Holgate*, L. R. 3 Ex. 299; *Johnson v. Stear*, 15 C. B. (N. S.) 330.

Other questions have been raised and argued which, in consequence of the views expressed above, it does not seem to us necessary to consider.

Exceptions overruled.

E. *Actions of Bailor against Bailee.*

LIT. § 71. . . . If I lend to one my sheepe to tathe his land, or my oxen to plow the land, and he killeth my cattell, I may well have an action of trespass against him, notwithstanding the lending.

BLOSS v. HOLMAN.

COMMON PLEAS. 1587.

[*Reported Owen*, 52.]

JOHN BLOSS brought an action of trespass, *quare vi et armis*, for taking of his goods, against Holman, and the defendant pleaded not

guilty, and the jury gave a special verdict, namely, that the plaintiff at the time of the trespass was of the Mystery of the Mercers, and that at that time the defendant was his servant, and put in trust to sell his goods and merchandises in *shopa sua, ibidem de tempore in tempus*, and that he took the goods of the plaintiff named in the declaration, and carried them away, and prayed the advice of the court, if the defendant were culpable or not; and upon the *postea* returned, *Shuttleworth* prayed judgment for the plaintiff. And the doubt was because the declaration was *quare vi et armis*, because it appeared that the defendant had custody of the goods; but *Shuttleworth* doubted whether he had custody, and cited the case of Littleton, namely, If I give my sheep to compas-ture, &c. and he kills them, an action of trespass lies; and the justices held that in this case the action did well lie; and PERIAM said that the defendant had only an authority, and not custody or possession; and judgment was given for the plaintiff. 3 H. 7, 12; 21 H. 7, 14. And WINDHAM said, that if he had embezzled his master's goods, without question it was felony. *Quod fuit concessum* (ANDERSON absent), and the law will not presume that the goods were out of the possession of the plaintiff; and the next day came the LORD ANDERSON and rehearsed the case, and said, that the defendant had neither general nor special property in the goods, for it is plain he could have no general property, and special he had not, for he could not have an action of trespass if they were taken away, then if he had no property, a trespass lies against him, if he take them; so if a shepherd steal sheep, it is felony, for he hath no property in them; wherefore he gave judgment accordingly.¹

BRYANT v. WARDELL.

EXCHEQUER. 1848.

[Reported 2 Exch. 479.]

TROVER for theatrical dresses and other property. Pleas: not guilty, and not possessed; upon which issue was joined. At the trial of the cause, before *Parke*, B., at the Middlesex sittings in the present term, it appeared that the plaintiff and the defendants, in the year 1845, with

¹ s. c. *sub nom. Glosse & Hayman's Case*, 1 Leon. 87; and s. c., *semble*, *Anonymous*, Moore, 248, pl. 392.

"It is important to note exactly the difference between a mere servant and a bailee. If A. gives goods to B. *e. g.* a carrier, A. retains the right to possess the goods, but he passes the possession itself to B. If, on the other hand, B. is not a carrier, but a mere servant, A., though he may give the custody or detention of the goods to B., does not pass to him the possession of them. Hence B., the bailee, has, as against third parties, a right to possession, and can bring trover; but B. the servant having no possession, has no right to possession, and cannot bring trover. It is conceived, that if B. should be in any way acting, not only as a servant, but also as a bailee, he might bring an action for the conversion of the goods." *Dicey, Parties*, 358, note (c).

a view to the exhibition of a dwarf of the name of Richard Garnsey, entered into the following agreement: "Memorandum of agreement made the 29th of December, 1845, between W. Bryant, of the one part, and R. Wardell, N. Dormer, and T. R. Lewis, of the other part. For the considerations hereinafter mentioned, the said W. B. hereby agrees to permit and allow R. Garnsey, otherwise called 'the miniature John Bull,' to be publicly exhibited by the said R. W., N. D., and T. R. L., for twelve calendar months from the date hereof, either in London, or within eighty miles thereof; and the said R. W., N. D., and T. R. L. shall have the exclusive control of such exhibition, and of the arrangement connected therewith; and they hereby agree to bear and pay all the expenses whatever which may be in any way incurred in connection with such exhibition. That the said R. W., N. D., and T. R. L., shall retain, receive, and be paid three fourths of the clear profits arising from the said exhibition, and the said W. B. shall receive or be paid the remaining one fourth of such profits. That this agreement shall continue and remain in full force for twelve calendar months certain; and in case the said R. W., N. D., and T. R. L., shall be desirous, at the expiration of such term, to continue the same for six calendar months longer, they shall be at liberty to do so; and in that case, the said W. B. shall, during such six calendar months, receive and be paid one half of the profits arising from the said exhibition, instead of one fourth. That James Garnsey, the father of the said R. G., shall be employed by the said parties hereto, at a salary of 15s. per week for twelve calendar months certain, provided this agreement shall remain in full force, and for such further time as such exhibition shall be continued, such salary to be considered as part of the expenses of the said exhibition. That the sum of 30s. per week shall be paid to the said J. G. and his wife, for twelve calendar months certain, or for such other or further time as such exhibition shall be continued; such payments shall be considered and form part of the expenses thereof. That A. Whitwham shall be employed by the said parties hereto for the first six weeks of the said exhibition, and the said W. B. shall be employed for three months next after the expiration of the said six weeks; and afterwards, the said A. W. and W. B. shall be employed alternately, so long as such exhibition shall be continued. That the said parties hereto are to be allowed to have the use of certain property and dresses during the said exhibition, and at the expiration of this agreement such property and dresses are to be given up to the said W. B. That the said W. B. or A. W. shall be at liberty to act as check-taker at such exhibition, or to appoint a person for such purpose at their own expense. That the said N. D. having, on the 27th day of December instant, advanced and paid the said W. B. the sum of £40 for the use of the said property and dresses, such sum of £40 is to be repaid to the said N. D. out of the first profits of the said exhibition. That the expenses of and connected with the said exhibition shall commence this day. That the accounts of and relating to such exhibition shall be set-

tled, and the balance and the profits ascertained and divided between the parties hereto, every fortnight." After this agreement had been entered into, the property in question was disposed of in a different way, but the jury found a verdict for the stage and scenery only, which, at the end of the term, were not delivered, but during the term were taken to pieces and applied — and this the jury found to have been done by all the defendants — in constructing a different sort of stage at a different exhibition. It was objected by the defendants' counsel that the plaintiff and defendants were partners under the terms of the agreement; and, secondly, that the plaintiff had not, at the time of the conversion, such a property in the goods as would maintain the action. The learned judge, however, was of a contrary opinion, and the plaintiff had a verdict.

Ogle now moved for a new trial on the ground of misdirection.

POLLOCK, C. B. We are all of opinion that there ought to be no rule in this case. In the first place, we think that the construction which was put upon the contract at the trial is correct. It is clear from several parts of the agreement that the words "the said parties" mean parties *other* than Bryant. For in one part of it there is a statement that "Whitwham shall be employed by the said parties" for a certain time, and "the said W. Bryant shall be employed" for another period. Now, it is clear that Bryant was not to be employed by himself, but by the three defendants. And in the succeeding clause the same words — *the said parties* — must mean the three defendants. There was, therefore, no partnership between the plaintiff and defendants in the property in question. As to the other point, we are clearly of opinion that trover is the proper form of action here, notwithstanding the continuance of the contract under which the goods had been bailed to the defendants. The case of *Cooper v. Willomatt*, 1 C. B. 672, is a decisive authority upon this point. It was there held that a bailee of goods for hire, by selling them, determines the bailment; and the bailor may maintain trover against the purchaser, though the purchase was *bona fide*. The cases on the subject are referred to there. The rule is, that where there has been a misuser of the thing lent, as by its destruction, or otherwise, there is an end of the bailment, and the action for trover is maintainable for the conversion.

*Rule refused.*¹

PARKE, B., ROLFE, B., PLATT, B., concurred.

¹ See *Farrant v. Thompson*, 5 B. & Ald. 826; *Fenn v. Bittleston*, 7 Exch. 152.

F. *Actions of Bailor against Third Person.*

WILBY v. BOWER.

NISI PRIUS. 1649.

[Reported Clayton, 135, pl. 243.]

THE plaintiff did deliver his horse to be kept at grass, and the defendant took him away from the pasture, &c., and the plaintiff brought trespass, and the judge overruled it that the action would not lie in this case, because the horse was in the possession of another, which was against my opinion being of counsel with the plaintiff, because the action is transitory, and he is in the owner's possession everywhere, and if I give my horse in London to I. S., I, being then at York, he may have trespass without other possession. F. N. B. 140; Perkins, 30; 21 E. 4, 25; 21 H. 7, 39; 21 H. 6, 43.

WARD v. MACAULEY.

KING'S BENCH. 1791.

[Reported 4 T. R. 489.]

THE plaintiff was the landlord of a house, which he let to Lord Montfort ready furnished; and the lease contained a schedule of the furniture. An execution was issued against Lord Montfort, under which the defendants, sheriff of Middlesex, seized part of the furniture, notwithstanding the officer had notice that it was the property of the plaintiff. For this the plaintiff brought an action of trespass against the defendants. At the trial *Lord Kenyon* thought that trespass would not lie, and that the plaintiff should have brought trover. A verdict, however, was taken for the plaintiff for value of the goods, with liberty to the defendants to move to enter up a nonsuit if this court should be of opinion that the plaintiff could not recover in this form of action.

Mingay obtained a rule for that purpose on a former day; against which

Erskine now showed cause.

LORD KENYON, Ch. J. The distinction between the actions of trespass and trover is well settled; the former is founded on possession, the latter on property. Here the plaintiff had no possession; his remedy was by an action of trover founded on his property in the goods taken. In the case put of a carrier, there is a mixed possession: actual possession in the carrier, and an implied possession in the owner.

BULLER, J. The carrier is considered in law as the servant of the owner, and the possession of the servant is the possession of the master.

PER CURIAM,

*Rule absolute.*¹

GORDON v. HARPER.

KING'S BENCH. 1796.

[Reported 7 T. R. 9.]

IN trover for certain goods, being household furniture, a verdict was found for the plaintiff, subject to the opinion of this court on the following case: On October 1st, 1795, and from thence until the seizing of the goods by the defendant, as after mentioned, Mr. Biscoe was in possession of a mansion-house at Shoreham and of the goods in question, being the furniture of the said house, as tenant of the house and furniture to the plaintiff, under an agreement made between the plaintiff and Mr. Biscoe, for a term which at the trial of this action was not expired. The goods in question were on the 24th of October taken in execution by the defendant, then sheriff of the County of Kent, by virtue of a writ of *testatum fieri facias* issued on a judgment at the suit of J. Broomhead and others, executors of J. Broomhead deceased, against one Borrett, to whom the goods in question had belonged, but which goods, previous to the agreement between the plaintiff and Mr. Biscoe, had been sold by Borrett to the plaintiff. The defendant after the seizure sold the goods. The question is, whether the plaintiff is entitled to recover in an action of trover.

Burrough, for the plaintiff.

Best, contra.

LORD KENYON, Ch. J. The only point for the consideration of the court in the case of *Ward v. Macauley* was, whether in a case like the present the landlord could maintain an action of trespass against the sheriff for seizing goods, let with a house, under an execution against the tenant; and it was properly decided that no such action could be maintained. What was said further by me in that case, that trover was the proper remedy, was an extrajudicial opinion, to which, upon further consideration, I cannot subscribe. The true question is, whether when a person has leased goods in a house to another for a certain time, whereby he parts with the right of possession during the term to the tenant, and has only a reversionary interest, he can, notwithstanding, recover the value of the whole property pending the existence of the term in an action of trover. The very statement of the proposition affords an answer to it. If, instead of household goods, the goods here taken had been machines used in manufacture

[¹ *McFarland v. Smith*, 1 Miss. 172, accord. — ED.]

which had been leased to a tenant, no doubt could have been made but that the sheriff might have seized them under an execution against the tenant, and the creditor would have been entitled to the beneficial use of the property during the term; the difference of the goods then cannot vary the law. The cases which have been put at the bar do not apply; the one on which the greatest stress was laid was that of a tenant for years of land whereon timber is cut down, in which case it was truly said, that the owner of the inheritance might maintain trover for such timber, notwithstanding the lease. But it must be remembered that the only right of the tenant is to the shade of the tree when growing, and by the very act of felling it his right is absolutely determined; and even then the property does not vest in his immediate landlord; for if he has only an estate for life it will go over to the owner of the inheritance. Here, however, the tenant's right of possession during the term cannot be divested by any wrongful act, nor can it thereby be re-vested in the landlord. I forbear to deliver any opinion as to what remedy the landlord has in this case, not being at present called upon so to do; but it is clear that he cannot maintain trover.

ASHHURST, J. I have always understood the rule of law to be, that in order to maintain trover the plaintiff must have a right of property in the thing, and a right of possession, and that unless both these rights concur the action will not lie. Now here it is admitted that the tenant had the right of possession during the continuance of his term, and consequently one of the requisites is wanting to the landlord's right of action. It is true that in the present case it is not very probable that the furniture can be of any use to any other than the actual tenant of the premises; but supposing the things leased had been manufacturing engines, there is no reason why a creditor, seizing them under an execution, should not avail himself of the beneficial use of them during the term.

GROSE, J. The only question is, whether trover will lie where the plaintiff had neither the actual possession of the goods taken at the time nor the right of possession. The common form of pleading in such an action is decisive against him; for he declares that being possessed, &c. he lost the goods; he is therefore bound to show either an actual or virtual possession. If he had a right to the possession, it is implied by law. Where goods are delivered to a carrier, the owner has still a right of possession as against a tort-feasor, and the carrier is no more than his servant. But here it is clear that the plaintiff had no right of possession; and he would be a trespasser if he took the goods from the tenant. Then by what authority can he recover them from any other person during the term? It is laid down in some of the books (*Vid.* 1 *Bac. Abr.* 45, and 5 *Bac. Abr.* 257, 2 *Com. Dig.* tit. *Detinue*, letter D.) that trover lies where *detinue* will lie, the former having in modern times been substituted for the old action of *detinue*. I will not say that it is universally true that the one action may be substituted for the other, because the authorities referred to in support of that proposition do not

apply to that extent; but certainly it may be said to be a good general criterion. But it is clear in this case that detinue would not lie, because the plaintiff had no right to the possession of the specific goods at the time. And if not, it is a strong argument to show that trover, which was substituted in lieu of it, cannot be maintained by the present plaintiff. Much stress has been laid on what was said in *Ward v. Macaulley*. But the only question there was, whether trespass would lie under these circumstances; and it was not necessary to determine how far trover might be maintained. It appears now very clearly upon examining that point that trover will not lie in any case, unless the property converted was in the actual or implied rightful possession of the plaintiff. In this case the plaintiff had neither the one nor the other pending the demise, and when that is determined perhaps he may have his goods restored to him again in the same state in which they now are, when it will appear that he has not sustained that damage which he now seeks to recover in this action.

LAWRENCE, J. The observation which my brother Grose has made upon the form of the action of trover is very material; the plaintiff therein states that he was possessed of the goods mentioned, and being so possessed he casually lost them, and that they came to the hands and possession of the defendant by finding. And the principal difficulty in most of the cases reported upon this head has been, whether the plaintiff had such a possession whereon he could declare in this action; as in *Latch*, 214, where the plaintiff, as executor, declared upon the possession of his testator, and the court held that to be sufficient, because the property was vested in the executor; and no other person having a right to the possession, the property drew after it the possession in law. In *Berry v. Heard*, Palm. 327, and Cro. Car. 242, it was for a long time in great doubt, whether the landlord had such a possession of timber cut down pending a lease on which he could maintain trover; but it was finally determined that he had, because the interest of the lessee in it remained no longer than while it was growing on the premises, and determined instantly when it was cut down. Now here if the taking of the goods by the sheriff determined the interest of the tenant in them, and revested it in the landlord, I admit that the latter might maintain trover for them upon the authority of the other case; but it is clearly otherwise; for here the tenant's property and interest did not determine by the sheriff's trespass, and the tenant might maintain trespass against the wrongdoer, and recover damages. He is bound to restore the goods to the landlord at the end of his term, and could not justify his not doing so because a stranger had committed a trespass upon him in taking them away. *Postea to the defendant.*

LOTAN v. CROSS.

NISI PRIUS. 1810.

[Reported 2 Camp. 464.]

TRESPASS for running against the plaintiff's chaise.

It appeared that the plaintiff, a stable-keeper, was owner of the chaise; but that when the injury was done, it was in the possession of one Brown, a friend of his, whom he had permitted to use it.

The objection being taken that trespass could not be maintained by the plaintiff under these circumstances,

LORD ELLENBOROUGH said: The property is proved to be in the plaintiff, and *prima facie* the thing is to be considered in his legal possession, whoever may be the actual occupier. Showing a letting for a certain time to Brown, and the possession would be in him; but a mere gratuitous permission to a third person to use a chattel does not, in contemplation of law, take it out of the possession of the owner, and he may maintain trespass for any injury done to it while it is so used. Vide *Smith v. Milles*, 1 T. R. 480; *Ward v. Macauley*, 4 T. R. 489; *Gordon v. Harper*, 7 T. R. 9.

The witnesses stated that the defendant seemed to have no intention of running his carriage against the plaintiff's chaise; and that the accident appeared to arise entirely from the negligent manner in which the defendant was driving.

Park thereupon objected that the action should have been case and not trespass.

LORD ELLENBOROUGH. The injury to the plaintiff being immediate from the act done by the defendant, it was settled in *Leame v. Bray*, 3 East, 393, that trespass is the proper remedy, and that the defendant's intentions were immaterial.

Verdict for the plaintiff.

Park, in the ensuing term moved for a new trial on the ground that the action was misconceived; and stated that *Leame v. Bray* had been overruled by the court of C. P. in *Huggett v. Montgomery*, 2 N. Rep. 446.

CURIA. If we are desired to review the case of *Leame v. Bray*, the matter should be brought before us in a different shape than a motion for a new trial. We do not entertain so slight an opinion of our own judgment as to allow it to be thus canvassed. We will wait for some case where the question is raised upon the record, and may be carried farther.

Rule refused.

HALL v. PICKARD.

KING'S BENCH. 1812.

[Reported 3 Campbell, 187.]

THIS was an action on the case; and the declaration stated that before and at the time of the grievance complained of, the plaintiff was owner and proprietor of two horses, which were hired for a certain term to one W. C.; that at the time of the grievance they were in the possession of the said W. C., and drawing his carriage along the public highway; and that while they were in such possession the defendant drove a cart against them, whereby one of them was killed.

It appeared, that when the misfortune happened, the defendant was himself driving the cart with great impetuosity and violence.

Park thereupon objected, that the action ought to have been trespass, and not case, relying upon *Leame v. Bray*, 3 East, 393, and *Lotan v. Cross*, 2 Campb. 464.

LORD ELLENBOROUGH. This is in the nature of an injury to the plaintiff's reversion. He was not in possession of the horses, and according to the authority of *Gordon v. Harper*, 7 T. R. 9, he neither could have maintained trespass nor trover for them. This is not like a gratuitous permission to use a chattel as in *Lotan v. Cross*, where the possession constructively remained in the owner. The horses were let to hire for a certain term to Dr. Carey, who had a right to retain them till that was expired, and who was driving them by his own servants when the mischief was done. Case therefore was here the proper and only remedy. It may likewise be worthy of consideration, whether in those instances where trespass may be maintained, the party may not waive the trespass and proceed for the tort.

The plaintiff had a verdict.

Garrow and *Abbott* for the plaintiff.

Park and *Espinasse* for the defendant.¹

AMES v. PALMER.

SUPREME JUDICIAL COURT OF MAINE. 1856.

[Reported 42 Maine, 197.]

EXCEPTIONS from *Nisi Prius*, MAY, J., presiding.

This was an action of trover for a cask and twenty gallons of rum, taken from on board a vessel. Plea, general issue and a justification.

The defendants, to justify the taking, offered a complaint made by

¹ See *White v. Griffin*, 4 Jones (N. C.), 139; *Enos v. Cole*, 53 Wis. 235.—ED.

said Palmer, defendant, and others, and a warrant and judgment of Woodbury Davis, a justice of the peace, which were objected to.

Defendants contended that plaintiff was bound to show that the freight on the property from Boston, due to the owners of schooner Comet, which brought it, had been paid, and the lien on it discharged.

Plaintiff asked the court to instruct the jury that "where goods are wrongfully taken from a bailee, that it is not necessary, in order for the owner to maintain trover for their value against the wrongdoer, that said owner should tender or pay to the bailee any freight for which said bailee might have a lien on the goods; nor could such wrongdoer set up any such lien except under the express authority of such bailee.

"2d. That no proof of ownership being made, the burden of proof would be on him, who asserted the existence of any unsatisfied lien, to prove it affirmatively."

The court instructed the jury that it was incumbent upon the plaintiff to satisfy them by proof that the plaintiff had both the property, and the right of immediate possession; and that, if they were satisfied from the evidence in the case, that the carrier had a lien for the freight, which had not been paid or waived, then the action could not be maintained.

The jury found for the defendants; and, being inquired of, stated, that they found for defendants on ground that the freight had not been paid, and the claim of the carrier had not been waived.

To the foregoing rulings the plaintiff excepted.

White & Palmer, for plaintiff.

1. It is not disputed that, in order to maintain the action of trover, the general rule is, that the plaintiff must have the right of immediate possession at the time of the conversion. But it does not follow that every wrongdoer may set up in excuse for his wrong, any personal right or privilege, or lien, which a carrier or bailee might have a right to enforce against the general owner, and to avail himself thereof, to defeat the action, without pretence of authority from such carrier or bailee.

A lien in favor of a carrier or bailee, for freight or advancement of expenses, is a personal right or privilege in his behalf, founded in the policy of trade, and is so considered and treated by all the foreign and American writers. Abbott on Shipping, 6 Amer. Ed. c. 2, part 4th, page 363, and notes; Angell on Carriers, c. 9, § 359.

The term signifies a claim annexed or attaching to chattels, without satisfying which, such property cannot be demanded even by its owner.

2. The possession of the person asserting such lien must be a lawful one. One may not seize the goods even of his debtor, and claim to retain them by virtue of his debt. 2 East, 235; 2 Moor, 730; 8 Price, 567.

3. This lien, or privilege, or personal right, may be waived or lost in various ways; as by permitting the goods to go out of his possession either actually or by construction.

If defendants had paid the freight, having the goods wrongfully in possession, they could not, by reason of such payment, have detained

them against the rightful owner; and a tender of freight and charges would not have been necessary previous to bringing an action for their value against the wrongdoer. *Lempiere v. Parley*, 2 T. R. 485.

4. Actual possession is not necessary to maintain trover. Conversion of the property being the gist of the action. *Hunt v. Houghton*, 13 Pick. 216; *Foster v. Gorton*, 5 Pick. 185.

When a person has delivered goods to a carrier, and the carrier has wrongfully parted with the possession of them to a stranger, the owner may maintain trover for the conversion against the stranger; for the owner has still the possession in law against the wrongdoer, and the carrier is considered merely as his servant. *Duel v. Moxon*, 1 Taunton, 391; *Gordon v. Harper*, 7 T. R. 9; 2 Saunders, 47, and note 2; *Bloxam v. Saunders*, 4 Barn. & Cres. 941.

“When goods by the tort of a third person are taken from a bailee or commission merchant, the owner has a right to immediate possession of them. And a lien for the merchant’s expenses cannot be set up except by himself or by his express authority.” Per Judge Woodbury: “Because such lien is a mere personal right and constitutes no bar to the possession of the property, unless set up by the authority of the party holding such lien.” *Jones v. Sinclair*, 2 N. H. 319; cites 7 East, 7; 5 Dur. & East, 605. This case is directly in point.

5. The taking being unlawful, and against the express forbidding of the owner, no demand is necessary.

Abbott, for defendants.

MAY, J. In this case the jury were instructed that it was incumbent on the plaintiff to satisfy them, by proof, that he had a right of property in the goods sued for, and the right of immediate possession; and that if they were satisfied from the evidence in the case, that the carrier had a lien for the freight, which had not been paid or waived, then the action could not be maintained. Upon the rendition of the verdict, the jury being inquired of by the court, stated that they found for the defendants, upon the ground that the freight had not been paid and the claim of the carrier had not been waived.

That a common carrier has a lien upon the goods transported by him, and a right to retain the possession, as against the general owner, until his reasonable charges are paid; and that the plaintiff, in an action of trover, cannot recover without proof of property in himself, and the right of immediate possession, is not questioned by the learned counsel in defence. Such is the law.

It is, however, contended that the right to retain possession of the goods transported, which, by the common law, attaches to a common carrier, to enforce the payment of his charges, is of such a nature that it does not deprive the general owner of the right to immediate possession, as against a wrongdoer; and constitutes no bar to the possession of the property, unless set up by the authority of the party holding such lien. Upon examination of the authorities we are of opinion that these positions are well maintained.

It has been repeatedly decided, both in England and in this country, that the lien of a factor is a personal privilege which is not transferable, and that no question upon it can arise except between the principal and factor. *Daubigny & als. v. Duval & al.*, 5 D. & E. 604; *McCombie v. Davies*, 7 East, 5; *Jones v. Sinclair*, 2 N. H. 319; *Holly v. Huggeford*, 8 Pick. 73. In this State the same principle has been adopted in relation to statute lien. *Pearsons v. Tinker*, 36 Maine, 384.

In the case of *Holly v. Huggeford*, just cited, it was argued in defence, that the lien of the factor so destroyed the right of possession in the general owner, that he could not maintain an action of trespass against an officer who had attached the goods as the property of the factor, but the court decided that such a position was untenable; and Parker, C. J., says, that "the lien of a factor does not dispossess the owner until the right is exerted by the factor. It is a privilege which he may avail himself of, or not, as he pleases. It continues only while the factor himself has the possession; and, therefore, if he pledges the goods for his own debt, or suffers them to be attached, or otherwise parts with them voluntarily, the lien is lost, and the owner may trace and recover them, or he may sue in trespass if they are forcibly taken; for his constructive possession continued notwithstanding the lien."

No reason is apparent why the same consequences should not attach to the lien of a common carrier as to that of a factor. In both cases the nature of the lien is the same. Both are common law liens; and such a lien has very properly been defined to be the right of detaining the property, on which it operates, until the claims which are the basis of the lien are satisfied. *Hammond v. Barclay*, 2 East, 235; *Oakes v. Moore & al.*, 24 Maine, 214. The object of these liens being the same, their effect must be the same. *Ubi eadem ratio ibi idem jus*. The lien, therefore, of a common carrier, does not deprive the owner of the goods of his right to immediate possession, as against a tortfeasor. The judge presiding at the trial, therefore, erred in instructing the jury, that if they were satisfied that the carrier had a lien for the freight, which had not been paid or waived, the plaintiff could not recover.

*Exceptions sustained and new trial granted.*¹

WILSON v. MARTIN.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE. 1860.

[Reported 40 N. H. 88.]

TRESPASS, for taking and carrying away two harnesses. Plea, the general issue. It appeared that the plaintiff, George L. Wilson, was

¹ *Holly v. Huggeford*, 8 Pick. 73; *Neff v. Thompson*, 8 Barb. 213; *Stowell v. Otis*, 71 N. Y. 36, accord. — ED.

the owner of the harnesses, and that, for the purpose of getting them cleaned and oiled, he carried them to the shop of one Page, who was a saddler and harness-maker by trade, and employed himself, in connection with his business as a saddler and harness-maker, and as a part of the same, in repairing, cleaning, and oiling harnesses. Page performed labor in cleaning and oiling these harnesses, and for that service was entitled to receive of the plaintiff the sum of two dollars. While the harnesses were thus in the possession of Page, and after he had performed the service aforesaid upon them, they were attached by the defendant, Asa Martin, as deputy-sheriff, upon a writ against one Morrison, as the property of Morrison; whereupon Page asserted his lien upon them for his labor done on the harnesses, as aforesaid, and refused to allow them to be taken from his possession by the defendant or anybody else until he was paid for such labor. The harnesses were moved from one room in Page's shop to another, and it was arranged between Page and the defendant that the harnesses should remain in Page's possession until his claim for labor was paid; the defendant agreeing that if it became necessary, or if he should desire to take them away, that he would first pay to Page the amount of Page's claim. While the harnesses remained in this situation, and within some two days after their attachment by the defendant as aforesaid, this suit was brought against the defendant for said harnesses, but not until after the plaintiff had demanded them of the defendant and he had refused to give them up. Page's claim for services has never been paid, and the harnesses remain, and have ever remained in his possession; and his lien on the harnesses for such services has in no way been released or discharged.

The court ruled upon the foregoing facts the plaintiff could not maintain trespass, and a verdict was thereupon taken for the defendant, and judgment is to be rendered thereon, or the same set aside and a new trial granted, as shall be ordered at the law term.

C. R. Morrison, and *Chapman*, for the plaintiff, referred to *Raitt v. Mitchell*, 4 Camp. 146; *Mont. on Lien*, 44, 141; 2 Saund. Pl. & Ev. 640; *Holly v. Huggefords*, 8 Pick. 73; *Daubigny v. Duval*, 5 D. & E. 608; *Brownell v. Manchester*, 1 Pick. 233; *Stevens v. Briggs*, 5 Pick. 177; *Walcot v. Pomroy*, 2 Pick. 122; *Stor. on Ag.* 484; *Jones v. Sinclair*, 2 N. H. 319; 8 Johns. 432; 7 D. & E. 12; 11 Johns. 285; 8 Barb. 213.

*Woods & Bingham*s (with whom were *Felton* and *J. S. Bryant*), for the defendant.

Trespass could not be maintained under the circumstances found in the case, because the plaintiff had neither possession or the right of possession. Page had expended labor and material in cleaning and oiling the harnesses, asserted his lien, and refused to let them go from his possession until he was paid. This he had the legal right to do. His lien existed at common law. 2 Kent Com. (1st ed.) 496; *Ch. on Con.* 545; *Townsend v. Newell*, 14 Pick. 332; *More v. Hitch-*

cock, 4 Wend. 292; *Scarfe v. Morgan*, 4 M. & W. 270; *Bevan v. Waters*, 14 E. C. L. 424, 3 C. & P. 520; *Grinnell v. Cook*, 3 Hill, 485; *Pinney v. Wells*, 10 Conn. 105, 115; *Burdick v. Murray*, 3 Vt. 302; *Mount v. Williams*, 11 Wend. 77; *Stoddard v. Huntley*, 8 N. H. 441; *Shapley v. Bellows*, 4 N. H. 353; *Partridge v. Dartmouth College*, 5 N. H. 286; *Bradley v. Spafford*, 23 N. H. 441; *Cowing v. Snow*, 11 Mass. 415; 9 N. H. 67. In *Cowing v. Snow*, trespass by the party holding the lien was sustained against the general owner. The plaintiff had not at the time of the alleged trespass either the actual or constructive possession of the property. The possession was rightfully in another, who had a special property therein, and before he could take possession he must buy and pay for that special property, or in some way discharge it. *Van Brunt v. Schenck*, 11 Johns. 377; *Putnam v. Wigley*, 8 Johns. 337; *Ward v. Macaulay*, 4 D. & E. 489; *Gordon v. Harper*, 7 D. & E. 9; *Clark v. Carleton*, 1 N. H. 110; *Poole v. Symonds*, 1 N. H. 289; *Heath v. West*, 28 N. H. 101; *Fairbanks v. Phelps*, 22 Pick. 535; *De Wolf v. Dearborn*, 4 Pick. 466; *Dennie v. Harris*, 9 Pick. 364; *Bourne v. Merritt*, 22 Vt. 429; *Soper v. Sumner*, 5 Vt. 274.

FOWLER, J. The right of lien at common law was originally confined to cases where persons, from the nature of their occupation, were under obligation, according to their means, to receive and be at trouble and expense about the personal property of others; and was limited to certain trades and occupations necessary for the accommodation of the public, such as common carriers, innkeepers, farriers, and the like. But in modern times the right has been extended so far that it may now be laid down as a general rule, to which there are few exceptions, that every bailee for hire, who by his labor and skill has imparted an additional value to the goods of another, has a lien upon the property for his reasonable charges in relation to it, and a right to retain it in his possession until those charges are paid. This includes all such mechanics, tradesmen, and laborers, as receive property for the purpose of repairing, cleansing, or otherwise improving its condition. *Cowper v. Andrews*, Hobart, 41; *The Case of an Hostler*, Yelverton, 67; and see the learned and valuable note of Mr. Justice Metcalf to this case, in his edition of Yelverton, 67 (a), and the authorities therein collected and commented upon; *Green v. Farmer*, 4 Burr. 2214; *Close v. Waterhouse*, 6 East, 523, n. 2; 2 Kent's Com. (5th ed.) 635; *Grinnell v. Cook*, 3 Hill, 491, and authorities cited by defendant's counsel *passim*; *Oaks v. Moore*, 24 Me. (11 Shep.) 214.

In the case at bar, Page had a lien upon the harnesses in controversy, for the labor and expense he had bestowed in cleansing and oiling them, at his election, and had a right to retain the possession and control of them until his charge in that behalf should be paid. He claimed his lien and asserted his right, and still so claims and asserts his interest in the goods. He has never parted with the possession of the harnesses, and still rightfully holds them against the plaintiff and

all the world. By his assertion of his lien, his right to retain the possession of the harnesses, for the payment of his charges, became vested, and must so continue as long as he shall retain that possession. He manifestly did not waive or intend to waive his lien, in consenting to hold the harnesses for the defendant. He only received and agreed to hold them subject to his own lien; and the defendant consented that Page should so receive and hold them, and that he would not as an officer interfere with them until that lien should be discharged; so that the lien was not affected or impaired by the arrangement. *Townsend v. Newell*, 14 Pick. 332.

The *gist* of trespass to personal property is the injury done to the plaintiff's possession. The substance of the declaration is, that the defendant has forcibly and wrongfully injured property in the possession of the plaintiff. To maintain the action, it is absolutely essential that the plaintiff should have had, at the time of the alleged injury, either actual or constructive possession of the property injured. His possession is constructive when the property is either in the actual custody and occupation of no one, but rightfully belongs to himself; or when it is in the care and custody of his servant, agent, or overseer, or in the hands of a bailee for custody, carriage, or other care or service, as a depositary, mandatary, carrier, borrower, or the like, where the bailee or actual possessor has no vested interest or right to the beneficial use or enjoyment of the property, or to retain it in his possession, but the owner may take it into his own hands at pleasure. But, where the general owner has parted with the actual possession, in favor of one who enjoys the exclusive right of present possession and enjoyment, retaining to himself only a reversionary interest, the possession is that of the lessee or bailee, who alone can maintain an action of trespass for a forcible injury to the property. 1 Ch. Pl. (7th ed.) 188, 195; 2 Gr. Ev., §§ 613, 614, 616, and authorities cited. *Clark v. Carlton*, 1 N. H. 110; *Poole v. Symonds*, 1 N. H. 289; *Heath v. West*, 28 N. H. 101; *Moulton v. Robinson*, 27 N. H. 550; *Marshall v. Davis*, 1 Wend. 109; *Nash v. Mosher*, 19 Wend. 431; *Newhall v. Dunlap*, 2 Shepl. 180; *Gay v. Smith*, 38 N. H. 171.

In this case, the plaintiff had parted with his possession of the harnesses, by delivering them to Page, to be cleaned and oiled. Page had cleaned and oiled them, and he thereby acquired, and had asserted the right, to retain them in his possession, even as against the plaintiff, until his charges for the labor and expense bestowed upon them should be satisfied. The plaintiff, then, had neither possession or the right of possession in the harnesses, at the time of the alleged injury to them, and could not maintain trespass. *Cowing v. Snow*, 11 Mass. 415, and authorities cited above.

It has been urged in argument that, although not liable for the original attachment, the defendant became liable by the subsequent demand of the plaintiff for the harnesses, and his refusal to deliver them up. But, if we are correct in the view, that the lien of Page having been

asserted, gave him a vested right to retain the possession of the harnesses until that lien was satisfied or the possession parted with, and the lien had not been satisfied or the possession parted with by Page, as the case distinctly finds, then the plaintiff, at the time of the demand, had no right to the possession of the harnesses, and of course could not be injured by the refusal of the defendant to yield to him what he was not entitled to have.

The plaintiff, having, at the time of the alleged injury to the harnesses by the defendant, neither the actual or constructive possession of them, but the same being then and still in the hands of his bailee, who had, and still has a vested right to retain them until the satisfaction of his lien thereon, there must be judgment on the verdict properly taken in the court below for the defendant.

*Judgment upon the verdict.*¹

¹ See *Smith v. Sheriff of Middlesex*, 15 East, 607.

"The bailor also obtained a right of action against the wrong-doer at a pretty early date. It is laid down by counsel in 48 Edward III., in an action of trespass by an agister of cattle, that, 'in this case, he who has the property may have a writ of trespass, and he who has the custody another writ of trespass. Persay: Sir, it is true. But he who recovers first shall oust the other of the action, and so it shall be in many cases, as if tenant by *elegit* is ousted, each shall have the assize, and, if the one recover first, the writ of the other is abated, and so here.'

"It would seem from other books that this was spoken of bailments generally, and was not limited to those which are terminable at the pleasure of the bailor. Thus in 22 Edward IV., counsel say, 'If I bail to you my goods, and another takes them out of your possession, I shall have good action of trespass *quare vi et armis*.' And this seems to have been Rolle's understanding in the passage usually relied on by modern courts.

"It was to be expected that some action should be given to the bailor as soon as the law had got machinery which could be worked without help from the fresh pursuit and armed hands of the possessor and his friends. To allow the bailor to sue, and to give him trespass, were pretty nearly the same thing before the action on the case was heard of. Many early writs will be found which show that trespass had not always the clear outline which it developed later. The point which seems to be insisted on in the Year Books is as Brooke sums it up in the margin of his Abridgment, that two shall have an *action* for a single act,—not that both shall have trespass rather than case. It should be added that the Year Books quoted do not go beyond the case of a wrongful taking out of the custody of the bailee, the old case of the folk-laws. Even thus limited, the right to maintain trespass is now denied where the bailee has the exclusive right to the goods by lease or lien; although the doctrine has been repeated with reference to bailments terminable at the pleasure of the bailor. But the modified rule does not concern the present discussion, any more than the earlier form, because it still leaves open the possessory remedies to all bailees without exception. This appears from the relation of the modified rule to the ancient law; from the fact that Baron Parke, in the just cited case of *Manders v. Williams*, hints that he would have been prepared to apply the old rule to its full extent but for *Gordon v. Harper*, and still more obviously from the fact, that the bailee's right to trespass and trover is asserted in the same breath with that of the bailor, as well as proved by express decisions to be cited.

"It is true that in *Lotan v. Cross*, Lord Ellenborough ruled at *Nisi Prius* that a lender could maintain trespass for damage done to a chattel in the hands of a borrower, and that the case is often cited as authority without remark. Indeed, it is sometimes laid down generally, in reputable text-books, that a gratuitous bailment does not change the possession, but leaves it in the bailor; that a gratuitous bailee

G. *Actions of Bailee against Third Person.*

ANONYMOUS.

KING'S BENCH. 1374.

[*Reported Year Book, 48 Edw. III. 20, pl. 8.*]

A MAN brought a writ of trespass in the King's Bench for certain oxen and cows taken with force and arms in a certain vill.

Hasty. Where you bring this writ of trespass for your beasts, *ut supra*, we say that the said beasts, at the time of the taking, belonged to Walter Wich', of W., and that Walter W., whose the beasts were, sued a replevin in the County; and thereupon the delivery was made, and then [the suit] was removed into the Common Bench, and we say against you, that we took the said beasts for rent arrear, issuing from the same place as to which he complains (and he showed for what term), and we demand judgment if you can take such beasts as belong to others than yourselves.

Ham. To this we say that Walter W. bailed to us the said beasts to agist on our land, so they were in our keeping, and an action for

is *quasi* a servant of the bailor, and the possession of one is the possession of the other; and that it is for this reason that, although the bailee may sue on his possession, the bailor has the same actions. A part of this confusion has already been explained, and the rest will be when I come to speak of servants, between whom and all bailees there is a broad and well-known distinction. But on whatever ground *Lotan v. Cross* may stand, if on any, it cannot for a moment be admitted that borrowers in general have not trespass and trover. A gratuitous deposit for the sole benefit of the depositor is a much stronger case for the denial of these remedies to the depositary; yet we have a decision by the full court, in which Lord Ellenborough also took part, that a depositary has case, the reasoning implying that *a fortiori* a borrower would have trespass. And this has always been the law. It has been seen that a similar doctrine necessarily resulted from the nature of the early German procedure; and the cases cited in the note show that, in this as in other respects, the English followed the traditions of their race.

"The meaning of the rule that all bailees have the possessory remedies is, that in the theory of the common law every bailee has a true possession, and that a bailee recovers on the strength of his possession, just as a finder does, and as even a wrongful possessor may have full damages or a return of the specific thing from a stranger to the title. On the other hand, so far as the possessory actions are still allowed to bailors, it is not on the ground that they also have possession, but is probably by a survival, which has been explained, and which in the modern form of the rule is an anomaly. The reason usually given is, that a right of immediate possession is sufficient, — a reason which excludes the notion that the bailor is actually possessed." Holmes, *Com. Law*, 171-175.

See 2 P. & M. Hist. (2d ed.) 172.

Contributory negligence by the bailee has been held a bar to an action by the bailor against a third party who injured the chattel by his negligence. *Arctic Fire Ins. Co. v. Austin*, 69 N. Y. 470; *Illinois Central R. Co. v. Sims*, 27 So. R. 527 (Miss.). *Contra, New York, L. E. & W. R. R. Co. v. New Jersey Elec. Ry. Co.*, 60 N. J. L. 338. — ED.

them given to us. Wherefore we demand judgment whether our writ is not good.

Hasty. And since you have confessed property of the beasts in Walter W., and also that the said beasts were in your custody, you may have an action of trespass by another writ, making mention of the fact that they were in your custody, and not by a general writ wherefore, &c.

CAVENDISH [C. J.] There is no other writ in the Chancery in the case. *Sed vide*, that for executors the writ will be *in custodia sua existentia*. And I say in this case, he who has the property can have a writ of trespass, and he who has the custody, another writ of trespass.

Percy. Sir, it is true, but he who shall recover first will oust the other of his action; and so it will be in several cases, as if tenant by *elegit* is ousted, both shall have an assize, and if one recovers first, the writ of the other is abated, *sic hic*. And afterwards the issue was taken whether they were agisted on the plaintiff's land or not. *Et sic ad patriam*.

ANONYMOUS.

COMMON PLEAS. 1409.

[*Reported Year Book, 11 Hen. IV. 17, pl. 39.*]

A MAN sued a general replevin for his cattle wrongfully taken.

Trem.' said that the cattle were another's, and not the plaintiff's, and he made an avowry for a return.

Skrene. He whom you allege to have the property in the cattle lent the cattle to us to manure and improve our land by force whereof they were in our custody, and we demand judgment, and we pray damages.

Trem.' And we demand judgment, because you knew the property was in another, as we have alleged, and we pray for a return.

COLEPEPER [J.] He supports his action well enough on the special matter which he has shown, why do you demur?

Trem.' He ought to have alleged in his writ *de averiis in custodia sua existentibus*.

Skrene. It is at our election to do either the one or the other.

THIRNING [C. J.] Plead no more about this matter, for against you he has property, &c.¹

¹ "HANKFORD [J.] If a stranger who has no right take beasts in my custody, I shall have a writ of trespass against him, and shall recover the value of the beasts, because I am charged with the beasts against him who has bailed them to me, and who has the property; but here the case is wholly otherwise, *quod HILL et COLEPEPER [JJ.] concesserunt. Et nota* that COLEPEPER [J.] said in this case that a man shall have a writ *de averiis in custodia sua existentibus*. *Sed vide* that those of Chancery will not grant such a writ *in custodia sua*." Year Book, 11 Hen. IV. 24, pl. 46 (1409).

"On the evidence, I admit it is questionable whether the plaintiff had a sufficient right of property. But the error, if any, lay with the jury. They were instructed that a mere servant, who, as such, has only the charge or custody of goods, has not a

ROOTH v. WILSON.

KING'S BENCH. 1817.

[Reported 1 B. & Ald. 59.]

CASE against the defendant for not repairing the fences of a close adjoining that of the plaintiff, whereby a certain horse of plaintiff, feeding in the plaintiff's close, through the defects and insufficiencies of the fences, fell into the defendant's close and was killed. Plea, not guilty. At the trial before *Richards*, Baron, at the last Spring Assizes for the county of Nottingham, it appeared that the horse was the property of the plaintiff's brother, who sent it to him on the night before the accident; that the plaintiff put it into his stable for a short time, and then turned it, after dark, into his close, where his own cattle usually grazed, and that on the following morning the horse was found dead in the close of the defendant, having fallen from the one to the other. The liability to repair was admitted. Defence, that the plaintiff had not such a property in the horse as to entitle him to maintain this action. The learned Judge, however, suffered the cause to proceed, and the jury found a verdict for the plaintiff. In Easter Term last a rule was obtained by *Reader* for setting aside this verdict and having a new trial, against which cause was now shown by

Copley, Serjt.

Reader, contra.

LORD ELLENBOROUGH, C. J. The plaintiff certainly was a gratuitous bailee, but as such he owes it to the owner of the horse not to put it into a dangerous pasture; and if he did not exercise a proper degree of care he would be liable for any damage which the horse might sustain. Perhaps the horse might have been safe during the daylight, but here he turns it into a pasture to which it was unused after dark. That is a degree of negligence sufficient to render him liable: such liability is sufficient to enable the plaintiff to maintain this action; he has an interest in the integrity and safety of the animal, and may sue for a damage done to that interest.

BAYLEY, J. I am entirely of the same opinion: the plaintiff by receiving the horse becomes accountable. Case is a possessory action; the declaration merely states that it was the horse of the plaintiff; if this had been an indictment, might it not have been described as the

special property in them, but that the property remains in the master, and the action for their recovery must be brought in his name; and that unless the goods in question had been delivered by Weir to the plaintiff as a bailee, and under a particular responsibility, this action could not be sustained. This was a direction as favorable to the defendant as the law would warrant. The judge left the application of the rule to the jury, whose business it was to apply it to the facts." Per GIBSON, J., in *Harris v. Smith*, 3 S. & R. 20, 23.

See *Tuthill v. Wheeler*, 6 Barb. 362.

horse of the plaintiff, as in the common case of goods stolen from a washerwoman?

ABBOTT, J. I think that the same possession which would enable the plaintiff to maintain trespass, would enable him to maintain this action.

HOLROYD, J. The plaintiff was entitled to the benefit of his field not only for the use of his own cattle, but also for putting in the cattle of others; and by the negligence of the defendant in rendering the field unsafe, he is deprived in some degree of the means of exercising his right of using that field for either of those purposes. Whether, therefore, the damage accrues to his own cattle, or the cattle of others, he still may maintain this action. *Rule discharged.*

BURTON v. HUGHES.

COMMON PLEAS. 1824.

[*Reported 2 Bing. 173.*]

TROVER for certain articles of furniture seized by the defendants under a commission of bankrupt against Robert Cross. At the trial before *Bayley, J.*, York Lent Assizes, 1824, Kitchen, a dealer in furniture, proved that he was owner of the furniture in question, which he had lent to the plaintiff under the terms of a written agreement, and that the plaintiff had placed it in a house occupied by the bankrupt's wife.

The agreement between Kitchen and the plaintiff was called for, but could not be produced for want of a stamp.

On the part of the defendants it was then contended that the plaintiff must be nonsuited; that at the time of the taking he had neither the property nor the possession of these goods, but only an alleged interest under an agreement; of which interest as the agreement could not be produced, there was no evidence whatever; that in order to support trover, the plaintiff must prove property, special interest, or actual possession, even though that possession should be tortious as against a third person. A verdict having been found for the plaintiff,

Cross, Serjt., in the last term, upon the grounds urged at the trial, obtained a rule *nisi* to set aside the verdict and enter a nonsuit.

Bosanquet, Serjt., now showed cause.

Cross, for the defendant.

BEST, C. J. If this had been a case between Kitchen and the plaintiff the agreement ought to have been produced, because that alone could decide the respective rights of those two parties; but it appears that Kitchen was to supply the plaintiff with furniture, and the question is, whether, after he had obtained it, he had a sufficient interest to

maintain this action. The case which has been referred to [*Sutton v. Buck*, 2 Taunt. 302] confirms what I had esteemed to be the law upon the subject, namely, that a simple bailee has a sufficient interest to use in trover. In that case a party, whose title was not completed by registry or any regular conveyance, sued in trover to recover a ship of which he had been possessed; registry was absolutely necessary to give him a title, and yet it was holden he might recover against a wrong-doer. Mansfield, C. J. says, "Suppose a man gives me a ship, without a regular compliance with the register act, and I fit it out at £500 expense, see what a doctrine it is that another man may take it from me and I have no remedy. The only doubt on the case, I think, arises from the register act, lest, if we should decide that any property passed by the transfer, it should militate against that act, and I have never been able entirely to free my mind from that doubt; but at present I think that on the circumstances, the plaintiff might maintain trover." Lawrence, J. says, "There is enough property in this plaintiff to enable him to maintain trover against a wrong-doer; and although it has been urged that the contract is void, with respect to the rights of third persons, as well as between the parties, yet, as far as regards the possession, it is good as against all, except the vendor himself." It is impossible to distinguish that case from the present; but it has been contended here that the defendants were not wrong-doers; — certainly not, in taking the effects of the bankrupts, but they are wrong-doers in taking the effects of a third person; they had no right to take goods belonging to the plaintiff which were clearly distinguishable from any the bankrupt ever had.

PARK, J. If this had been a question between Kitchen and the bankrupt, it might have borne a totally different complexion; but whether Mrs. Cross was to live in the house, or Burton, was altogether immaterial as against the defendants, and the case which has been referred to is much stronger than the present. There it was holden that possession of a ship under a transfer, void for non-compliance with the register act, is a sufficient title in trover against a stranger for parts of the ship being wrecked. Admitting that the defendants were not wrong-doers, at all events they were strangers, and possession is sufficient to enable a party to maintain trover against a stranger. What Chambre, J. says, is very material. "The plaintiff has possession under the rightful owner, and that is sufficient against a person having no color." (Here the plaintiff was let into possession by Kitchen, the rightful owner.) "An agister, &c., a carrier, a factor, may bring trover; even a general bailment will suffice without being made for any special purpose, but only for the benefit of the rightful owner." It was immaterial how the plaintiff came into possession, but as there was no dispute between him and Kitchen the verdict must stand.

BURROUGH, J. concurring, the rule was

Discharged.

POOLE v. SYMONDS.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE. 1818.

[Reported 1 N. H. 289.]

TROVER for a mare. The cause was tried here at the last May Term upon the general issue, when it appeared in evidence that the mare once belonged to one Ezra Flanders; that Ziba Huntington, a deputy sheriff, having an execution in his hands in favor of P. Noyes against Flanders for about \$30 debt and costs, on the 26th of June 1817, seized the mare upon the execution; that Flanders, being desirous to procure time to raise money and pay the execution, and thereby prevent the sale of the mare, requested Huntington to delay the sale, to which Huntington, who had been directed by Noyes to grant Flanders any indulgence not inconsistent with the safety of the debt, assented; Huntington took the mare into his possession, and delivered her for safe keeping to the plaintiff, who gave Huntington his promise in writing to return her on demand. Poole kept the mare until the 8th of August 1817, when she was attached as the property of Flanders by the defendant, another deputy sheriff, on mesne process in favor of A. W. Morse against Flanders, and is now held by the defendant by virtue of that attachment. It did not appear that the mare was ever in the possession of Flanders after Huntington seized her, nor that Huntington had ever advertised her for sale upon the execution.

The jury returned a verdict for the plaintiff, and assessed the damages at \$30.

William Smith, for the defendant.

Gilbert and J. Bell, for the plaintiff.

The opinion of the court was delivered by

RICHARDSON, C. J. On behalf of the defendant it is contended, that Poole has not a sufficient interest in the chattel in question to enable him to maintain this action, and several decisions in the Supreme Court of Massachusetts are relied upon as directly in point; and it is not to be doubted, that, if those decisions were correct, this objection must prevail. But the decisions in this State have been different. In the case of *Eastman v. Eastman*, in the county of Hillsborough, December Term, 1814, where the case was precisely like the present one, except that the article in question had been taken upon mesne process in Massachusetts, and the plaintiff had become answerable for it to an officer there, the cases in the ninth volume of the Massachusetts Reports were cited by counsel and considered by the court; but the court (Smith, C. J., Livermore, and Ellis, justices) were clearly of opinion, that the plaintiff might maintain the action. No authority is cited by the court in Massachusetts in support of their decision; nor is it recollected that the determination here was supported by authorities. We have therefore felt it to be our duty to reconsider the question, and

endeavor by a careful examination of the adjudged cases which bear upon the point to ascertain what the real law of the case is.

No man can maintain trespass, trover, or replevin for personal chattels without either an absolute or special property in the goods, and also possession. But this possession may be either actual or constructive. Thus an executor is by construction of law possessed of the goods of the testator, and may maintain trover for them, although he has never been in the actual possession of them. So where one had wreck by prescription or grant, and another took it away, trespass or trover lay before seizure. And if A. in London gives J. S. his goods in York, and another takes them away before J. S. obtains actual possession, J. S. may maintain trespass or trover. So if the owner deliver his goods to a carrier or other bailee, although in such case another has the actual possession, still the owner has by construction of law a sufficient possession to maintain trover or trespass. This constructive possession is not founded on the mere right of property, but upon the right of possession. For if he, who has the absolute property, has not also the right of possession, he can have no constructive possession. Thus where the owner of goods let them for a year and they were taken away by a third person within the year, it has been held that he could maintain neither trespass nor trover. This constructive possession in one is by no means inconsistent with an actual possession in another. In many cases either he who has the actual, or he who has the constructive possession, may maintain trespass, trover, or replevin; but a judgment in favor of one will be a bar to an action in favor of the other. In some cases he who has only a special property, may have a constructive possession. Thus a factor, to whom goods have been consigned, but have never been received, has such a constructive possession, that he can maintain trover.

A special property in goods may in some cases be founded upon mere possession. Thus he who finds goods which have been lost has a special property in them, because possession is evidence of title. Thus too where goods were stolen from a stage coach, it was held, that they were well alleged in the indictment to be of the goods or chattels of the stage coachman, although he was the mere servant of the owner of the coach, and not answerable for the goods.

A special property may also be founded upon a responsibility for, or an interest in, the possession of chattels. Thus he, to whom goods are delivered merely to keep and redeliver upon request, has a special property in them. 21 H. 7, 14, pl. 23, where it is said the point had often been decided. Jones on Bailment, 112.

That a sheriff, who has seized goods upon mesne process, or upon execution, an agister of cattle, a carrier, factor, consignee, pawnee, trustee, &c. have a special property, admits of no doubt. 11 H. 4, 17, pl. 39; 48 E. 3, 20, pl. 8; 2 Saund. 47; 6 John. 195; 12 John. 403.

But a mere servant has not a special property in goods. Thus where a servant was employed in a shop merely to sell goods, he was held

not to have a special property in them. Nor has a shepherd, who is employed to tend sheep, any property in the sheep. The reason is, because the law considers the goods and the sheep as much in the actual possession of the owner, as if the servant were not with them, and the servant is not responsible for them. If the goods or the sheep are taken away by a stranger, it is no injury to the servant, because he has no interest in the possession. But if a servant undertakes specially to be accountable for goods committed to his custody, he at once exchanges the character of a mere servant for that of a bailee, and has a special property.

Thus it seems that any person, who has an absolute or a special property, in a personal chattel, and a right to reduce it to immediate possession, has in law such a possession as will enable him to maintain an action to vindicate his right of possession, and this is what the law denominates a constructive possession. And any individual, who has a particular interest in the possession of such chattel, whether such interest be founded upon the evidence of title which possession affords, as in the case of a finder of lost goods, or on a right to the use of the chattel, as in the case of a hirer, &c., or on some responsibility for it, as in the case of a sheriff, &c., has what the law denominates a special property, and may maintain an action, whenever that special property is unlawfully invaded.

It now remains to compare the facts in the case before us with these principles. Huntington having seized the mare upon execution, delivered her to Poole and took his promise in writing to redeliver her on demand. Did this contract impose any responsibility upon Poole? That it did is not to be doubted. The extent of his responsibility is immaterial. It is enough that he was responsible for the safe-keeping and redelivery of the mare. This according to the principles to be deduced from the books gave him a sufficient interest in the possession to enable him to maintain this action. But it is said that Huntington had a special property in the mare; that two persons cannot have severally a special property in a chattel, and that therefore, Poole would not have a special property in her. It is for those who hold this doctrine to show why two may not have severally, a special interest in a chattel, as well as two may have severally, one the general, and the other a special property in it at the same time. The reason is certainly not very obvious. It is true, that there are but two species of property in a chattel, absolute and special; but it by no means follows from this, that two cannot have severally a special property in it. There can be but one absolute owner of a chattel, but it seems to us very clear that several persons may have, severally, a special interest in it. Thus in the present case, when Huntington had seized the mare he immediately became responsible both to the debtor and creditor, and thereby acquired a special property in her, and when he delivered her to Poole for safe-keeping he did not part with his special property; but the moment that Poole became responsible for the safe-keeping and

redelivery of her, he also acquired a special property in her, perfectly subordinate to and not at all inconsistent with, the special property of Huntington. If then the mare was unlawfully taken by the defendant, it was an injury both to Huntington and to Poole, and either may maintain an action: but a judgment in favor of one will be a good bar to an action by the other. Flanders had the general property, but not the right of possession; he could therefore maintain no action. Huntington's right of action was founded upon his special property and right of possession; Poole's upon his special property and actual possession. If Poole is to be considered as a mere servant, he must be held responsible to Huntington only as a servant. For it would be repugnant to every principle of justice to hold him responsible as a bailee while we allow him only the rights of a mere servant. But a mere servant is not responsible for goods forcibly taken from him, and if Poole is to be considered as employed in that character it would seem to be a good defence to any action Huntington may bring against him, that the mare was taken by force from him by the debtor or any other person without his fault. But this would undoubtedly be contrary to the understanding of the parties and might defeat the very object of the contract. It is therefore the opinion of the court that the plaintiff had a sufficient interest in the mare to enable him to maintain this action, and thus this objection cannot prevail.

But the defendant further contends, that Huntington having kept the mare more than five weeks without taking any step to complete the levy, the attachment so far as respected other creditors of Flanders was dissolved, and cites the case of *Caldwell v. Eaton* [5 Mass. 399] in support of this objection. Our statute relative to the seizure and sale of goods upon executions is precisely like that of Massachusetts, and we see no reason to doubt that the construction of their court upon the statute in the case just mentioned is correct. We are not however prepared to say that the sheriff can in no case with the consent of the debtor keep the goods more than four days before sale without dissolving the attachment with respect to other creditors, provided he proceeds within the four days to fix and advertise the time and place of sale. When the sheriff seizes goods upon execution he should immediately within the four days proceed to advertise them for sale, and should sell them as soon after the expiration of the four days as can be conveniently done. If he does not do this, other creditors have a right to consider the attachment as dissolved, and to take the goods from his possession. The verdict in this case must therefore be set aside and a new trial be granted.¹

¹ *Thayer v. Hutchinson*, 13 Vt. 504, *accord.* So in a case of replevin. *Miller v. Adsit*, 16 Wend. 335.

"There are some early cases in this Commonwealth in which the court, in speaking of keepers and receptors of attached property, fails to notice the distinction between one who is appointed a keeper, and thereby becomes a mere custodian and servant of the attaching officer, and one who takes the property into his possession and gives a receipt for it, in which he contracts to keep it safely, and to return it on

HAMPTON v. BROWN.

SUPREME COURT OF NORTH CAROLINA. 1851.

[Reported 13 Ired. 18.]

APPEAL from the Superior Court of Law of Davidson County, at the Fall Term, 1851, his Honor Judge Ellis presiding.

This is an action of trover for a horse, and was tried on the general issue. The plaintiff was deputy sheriff, and had a *fiery facias* on a judgment in favor of one Hoffman against one Horne, by virtue of which he seized the horse. He did not, however, take the horse out of the possession of Horne, and the latter sold it to the defendant a few days afterwards, and, upon demand by the plaintiff, the defendant refused to give the horse up. The counsel for the defendant insisted that the action would not lie, because the plaintiff did not keep the possession of the horse, but left it with Horne, from whom the defendant purchased; and, also, because the defendant, if liable at all, was liable at the suit of the sheriff, and not of the plaintiff. But the Court instructed the jury that upon these facts the plaintiff was entitled to recover; and after a verdict and judgment against him, the defendant appealed.

Gilmer and *Miller*, for the plaintiff.

No counsel for the defendant.

RUFFIN, C. J. Although a sheriff may have trover, or trespass for goods seized in execution, which are taken by another, yet his deputy cannot. The reason why the sheriff has the action is, that the debtor is discharged and the sheriff becomes liable to the value of the goods, and therefore the law vests the property in him. *Wilbraham v. Snow*, 2 Saund. 47. But the law charges the deputy with no duty to the creditor. If he make defaults in serving the execution, he cannot be sued for it, but his principal only. On the contrary, when he takes goods on execution the sheriff becomes answerable for their value to the creditor, and hence the property vests in the sheriff and not in the deputy. It was suggested that the deputy held as the bailee of the sheriff, and thus had a special property. He, however, is not a bailee, in the sense of having a possession of his own, but he is merely the servant of his superior and holds for him. The plaintiff, therefore, has no property in the horse, and cannot have this action.

PER CURIAM.

*Judgment reversed, and venire de novo.*¹

demand or at a stated time, whereby he becomes personally responsible for it as a bailee. But it is now well established, both in this Commonwealth and elsewhere, that such a receiptor is a bailee who has a possession, and it follows that he may maintain trespass, trover, or replevin against a wrongdoer. The earlier cases in New York which hold otherwise are overruled in *Miller v. Adsit*, 16 Wend. 335, in which it is expressly decided that a receiptor of attached property may maintain replevin for it; and the same doctrine is laid down in *Peters v. Stewart*, 45 Conn. 103." KNOWLTON, J., in *Robinson v. Besarick*, 156 Mass. 141, 143, 144. — ED.

¹ "It has been supposed, to be sure, that a 'special property' was necessary in order to maintain replevin or trover. But modern cases establish that possession is

sufficient, and an examination of the sources of our law proves that special property did not mean anything more. It has been shown that the procedure for the recovery of chattels lost against one's will, described by Bracton, like its predecessor on the Continent, was based upon possession. Yet Bracton, in the very passage in which he expressly makes that statement, uses a phrase which, but for the explanation, would seem to import ownership, — *Poterit rem suam petere*. The writs of later days used the same language, and when it was objected, as it frequently was, to a suit by a bailee for a taking of *bona et catalla sua*, that it should have been for *bona in custodia sua existentia*, it was always answered that those in the Chancery would not frame a writ in that form.

"The substance of the matter was, that goods in a man's possession were his (*sua*), within the meaning of the writ. But it was very natural to attempt a formal reconciliation between that formal word and the fact by saying that, although the plaintiff had not the general property in the chattels, yet he had a property as against strangers, or a special property. This took place, and, curiously enough, two of the earliest instances in which I have found the latter phrase used are cases of a depositary, and a borrower. Brooke says that a wrongful taker 'has title against all but the true owner.' In this sense the special property was better described as a 'possessory property,' as it was, in deciding that, in an indictment for larceny, the property could be laid in the bailee who suffered the trespass.

"I have explained the inversion by which a bailee's right of action against third persons was supposed to stand on his responsibility over, although in truth it was the foundation of that responsibility, and arose simply from his possession. The step was short, from saying that bailees could sue because they were answerable over, to saying that they had the property as against strangers, or a special property, because they were answerable over, and next that they could sue because they had a special property and were answerable over. And thus the notion that special property meant something more than possession, and was a requisite to maintaining an action, got into the law.

"The error was made easier by a different use of the phrase in a different connection. A bailee was in general answerable for goods stolen from his custody, whether he had a lien or not. But the law was otherwise as to a pledgee, if he had kept the pledge with his own goods, and the two were stolen together. This distinction was accounted for, at least in Lord Coke's time, by saying that the pledge was, in a sense, the pledgee's own, that he had a special property in it, and thus that the ordinary relation of bailment did not exist, or that the undertaking was only to keep as his own goods. The same expression was used in discussing the pledgee's right to assign the pledge. In this sense the term applied only to pledges, but its significance in a particular connection was easily carried over into the others in which it was used, with the result that the special property which was requisite to maintain the possessory actions was supposed to mean a qualified interest in the goods." Holmes, Com. Law, 242-244.

"The property in the goods is that which most usually draws to it the right of possession; and the right to maintain an action of trover is therefore often said to depend on the plaintiff's *property* in the goods; the right of immediate possession is also sometimes called itself a special kind of property; *Rogers v. Kennay*, 9 Q. B. 592; but these expressions should not mislead the student. The action of trover tries only the right to the immediate possession, which, as we shall now see, may exist apart from the *property* in the goods. . . . The action of *trover* tries the right of possession, and may or may not determine the property. For strange as it may appear, there is no action in the law of England by which the property either in goods or lands is alone decided." Wms. Pers. Prop. (12th ed.) 31, 32.

See also Dicey on Parties, 346, 347, 352, 353, 358-360.

H. *Measure of Damages in Action by Bailor or Bailee.*

CHESLEY v. ST. CLAIR.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE.

[Reported 1 N. H. 189.]

THIS was an action of trover for a horse, saddle, and bridle. The cause was tried here at the last term upon the general issue. The plaintiff, to maintain the issue on his part, proved that one Benjamin Hodgdon had bailed the articles mentioned in the writ, to him to ride to Dover. The defendant denied that Hodgdon had any interest in the article, and introduced evidence to show that the property was his own. Upon this the plaintiff called Hodgdon as a witness to prove that he, Hodgdon, was the lawful owner of the property. The defendant objected to the admission of Hodgdon as a witness on the ground that he, having bailed the property to the plaintiff, was interested in the event of the suit, but he was admitted, and the jury returned a verdict for the plaintiff.

J. Mason, for the defendant.

Ichabod Bartlett and *James Bartlett*, for the plaintiff.

RICHARDSON, C. J. The question is, whether in an action of trover, brought by the bailee of a chattel against a stranger, the bailor is a competent witness for the bailee to prove the general property in himself? There is such a privity between the bailor and the bailee of chattels that a recovery by one in an action of trespass or trover against a stranger for taking the goods is, in general, a bar to an action by the other. And a recovery by the bailee in trespass or trover against a third person operates as a transfer of the property or chattel to such third person. *Solutio pretii emptionis loco habetur*. It seems to follow that whatever may be recovered in such a suit by a bailee must be recovered to the use of the bailor, as much as if it were recovered upon a contract of sale of the chattel by the bailee with the assent of the bailor. And it has been held that a verdict in favor of the bailee may be used in evidence in an action by the bailor against the bailee. If this be law, it is clear that Hodgdon was an incompetent witness.

It is very clear that a recovery by the bailee betters the situation of the bailor because it settles the question of property, and this has been held sufficient to exclude a witness.

There may be cases, however, in which the bailor will be a competent witness for the bailee. Thus if the goods are wrongfully taken from the bailee, and he obtains possession of them again, or if the bailor releases the property to the trespasser, and the bailee brings trespass to recover the damages he may have sustained by being deprived of the possession, as it seems he may, in such case there seems

to be no reason why the bailor should not be a witness for the bailee, for it is clear that he can have no interest in the recovery.

In the present case as the object of the suit is to recover the value of the property, and as the only question between the parties is, whether the property belonged to Hodgdon or the defendant, we are of opinion that Hodgdon was an incompetent witness for the plaintiff and that the verdict must be set aside, and a new trial granted.¹

BREWSTER v. WARNER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1883.

[Reported 136 Mass. 57.]

TORT. Trial in the Superior Court, without a jury, before *Blodgett, J.*, who allowed a bill of exceptions, in substance as follows :

The plaintiff, on September 15, 1881, hired a horse and carriage from the livery stable of one Foster in Boston to drive to Beacon Park and return. Just before reaching the Park gate, a servant of the defendants, who was driving a pair of horses hitched to a hack, carelessly, as it was alleged, drove against the carriage in which the plaintiff was driving, and injured it. This action was brought to recover the damages so sustained.

Foster was the owner of the carriage injured. The plaintiff told Foster to send the carriage to a repair shop and have it repaired, and he would pay the bill. The carriage was repaired, and the bill for repairs was made to the plaintiff, and presented to him for payment ; but he had not paid it at the time of trial.

This was all the evidence as to the ownership, use, and repairs of the carriage. The defendants requested the judge to rule that, upon this evidence, the plaintiff could not recover, regardless of the question of negligence. But the judge ruled otherwise, and found for the plaintiff; and the defendants alleged exceptions.

J. O. Teele, for the defendants.

A. O. Brewster, for the plaintiff.

¹ MEASURE OF DAMAGES IN ACTION BY BAILOR OR BAILEE. — "He who hath a special property of the goods at a certain time shall have a general action of trespass against him who hath the general property, and upon the evidence damages shall be mitigated ; but clearly, the bailee, or he who hath a special property, shall have a general action of trespass against a stranger, and shall recover all in damages, because that he is chargeable over. See 21 Hen. 7, 14 b. acc." *Heydon and Smith's Case*, 13 Co. 67, 69 ; *Lyle v. Barker*, 5 Binn. 457 ; *Harker v. Dement*, 9 Gill, 7 ; *Little v. Fossett*, 34 Me. 545 ; *Chamberlain v. West*, 37 Minn. 54 ; *Baggett v. McCormack*, 73 Miss. 552 ; *Guttner v. Pacific Co.*, 96 Fed. R. 617 ; *Mangan v. Cox*, 2 N. Z. Jur. n. s. 264 ; s. c. sub nom. *Mangan v. Leary*, 3 N. Z. Jur. n. s. C. A. 10, accord. And see *White v. Webb*, 15 Conn. 302 ; *Atkins v. Moore*, 82 Ill. 240 ; *Brewster v. Warner*, 136 Mass. 57. — Ed.

HOLMES, J. The modern cases follow the ancient rule, that a bailee can recover against a stranger for taking chattels from his possession. *Shaw v. Kaler*, 106 Mass. 448. *Swire v. Leach*, 18 C. B. (N. S.) 479. See Year Book 48 Edw. III. 20, pl. 8; 20 H. VII. 5, pl. 15; 2 Roll. Abr. 569, *Trespass*, P. pl. 5; *Nicolls v. Bastard*, 2 Cr., M. & R. 659, 660. And as the bailee is no longer answerable to his bailor for the loss of goods without his fault, his right to recover must stand upon his possession, in these days at least, if it has not always done so. But possession is as much protected against one form of trespass as another, and will support an action for damage to property, as well as one for wrongfully taking or destroying it. No distinction has been recognized by the decisions. *Rooth v. Wilson*, 1 B. & Ald. 59; *Croft v. Alison*, 4 B. & Ald. 590. *Johnson v. Holyoke*, 105 Mass. 80. The ruling requested was obviously wrong, as it denied all right of action to the plaintiff, and was not confined to the *quantum* of damages.

Even if the question before us were whether the plaintiff could recover full damages, his right to do so could not be denied as matter of law. A distinction might have been attempted, to be sure, under the early common law. For, although the bailee's right was undoubted to recover full damages for goods wrongfully taken from him, this was always accounted for by his equally undoubted responsibility for their loss to his bailor, and there is no satisfactory evidence of any such strict responsibility for damage to goods which the bailee was able to return in specie.

But if this reasoning would ever have been correct, which is not clear, it can no longer apply when the responsibility of bailees is the same for damage to goods as for their loss, and when the ground of their recovery for either is simply their possession. Any principle that permits a bailee to recover full damages in the one case, must give him the same right in the other. But full damages have been allowed for taking goods, in many modern cases, although the former responsibility over for the goods has disappeared, and has been converted by misinterpretation into the now established responsibility for the proceeds of the action beyond the amount of the bailee's interest. *Lytle v. Barker*, 5 Binn. 457. 7 Cowen, 681, n. (a). *White v. Webb*, 15 Conn. 302. *Ullman v. Barnard*, 7 Gray, 554. *Adams v. O'Connor*, 100 Mass. 515, 518. *Swire v. Leach*, 18 C. B. (N. S.) 492. The latter doctrine has been extended to insurance by bailees. *DeForest v. Fulton Ins. Co.* 1 Hall, 84, 91, 110, 116, 132. Crompton, J., in *Waters v. Monarch Ins. Co.* 25 L. J. (N. S.) Q. B. 102, 106.

If the bailee's responsibility over in this modern form is not sufficient to make it safe in all cases to recognize his right to recover full damages, even where it was formerly undoubted, at least it applies as well to recoveries for harm done to property as it does to those for taking. *Rindge v. Coleraine*, 11 Gray, 157, 162. And if full damages are ever to be allowed, as it is settled that they may be, they should be recovered in the present case, where the plaintiff appears to have made

himself debtor for the necessary repairs with the bailor's assent. *Johnson v. Holyoke, ubi supra*. It is not necessary to consider what steps might be taken if the bailor should seek to intervene to protect his interest.

Exceptions overruled.

CLARIDGE v. SOUTH STAFFORDSHIRE TRAMWAY
COMPANY.

QUEEN'S BENCH. 1892.

[Reported [1892] 1 Q. B. 422.]

APPEAL from the County Court of Staffordshire.

The owners of a horse sent it to the plaintiff, an auctioneer, to sell by auction, and gave him leave to use it until it was sold. Whilst the horse was being driven in the plaintiff's carriage along a street, it was frightened by a steam tramcar of the defendants which was travelling at an excessive speed. The horse, in consequence, plunged and fell, and damaged both the carriage and itself. The accident was wholly due to the negligence of the defendants. The plaintiff brought an action in the County Court to recover the amount of the depreciation of the horse as well as the damage to the carriage. The judge directed the jury that, as the plaintiff had not been guilty of any negligence, and was, consequently, under no liability to the owners of the horse, he was not entitled to recover for the injury to the horse, and judgment was accordingly entered for the damage to the carriage only. The plaintiff appealed.

Hugh Mitchell, for the plaintiff. The plaintiff, being in possession of the horse, was entitled to recover from the defendants, who were wrongdoers, the full amount of the depreciation. A person who wrongfully does an injury to a chattel is estopped from alleging that the party in possession of the chattel at the time of the injury done was not the true owner; for possession is a good title as against a wrongdoer: *Jeffries v. Great Western Ry. Co.*, 5 E. & B. 802. Here the action was, no doubt, an action on the case; but no distinction is to be drawn in this respect between such an action and an action of trespass or trover. "Case is a possessory action:" per Bayley, J., *Rooth v. Wilson*, 1 B. & A. at p. 62. In *Croft v. Alison*, 4 B. & A. 590, which was an action on the case, the hirers of a carriage for the day were held to be the owners as against the defendant, who was a wrongdoer. No doubt the bailor may sue as well as the bailee, and "whichever first obtains damages it is a full satisfaction:" per Parke, B., *Nicholls v. Bastard*, 2 C. M. & R. at p. 660. And it is conceded that the bailee cannot retain for his own benefit such portion of the damages recovered as is in excess of his own loss. There are several cases which establish that as regards such ex-

cess he becomes trustee for the bailor. In *Rooth v. Wilson*, 1 B. & A. 59, Lord Ellenborough indeed rested the right of the bailee to recover the full value of a chattel upon the ground of his liability over to his bailor; but all the other judges went upon the ground of his mere possession.

Disturnal, for the defendants, was not called upon.

HAWKINS, J. I am of opinion that this appeal must be dismissed. The appeal is with reference to the measure of the damages recoverable by the plaintiff for an injury to a horse and carriage caused by the negligence of the defendants. The carriage was the property of the plaintiff; the horse was only in the possession of the plaintiff as bailee. The judge entered judgment for the plaintiff for the damage to the carriage, but held that he could not recover for the injury to the horse. The question is whether he was right in so holding. Now, it seems perfectly clear that the plaintiff was under no liability to his bailor for the damage to the horse, for he was not an insurer and he had not been guilty of any negligence. But it has been contended that, notwithstanding that he was under no such liability, he is nevertheless entitled to recover the amount of the depreciation because he was in possession of the horse at the time of the accident, though it is admitted that having recovered such damages he would hold them as trustee for the bailor. I cannot accede to that view. It is true that if a man is in possession of a chattel, and his possession is interfered with, he may maintain an action, but only for the injury sustained by himself. The right to bring an action against the wrongdoer is one thing; the measure of the damages recoverable in such action is another. And here the plaintiff has suffered no loss at all. It was contended that though either the bailee or the bailor might sue, only one action could be brought, and that if the bailee recovered first the bailor's right of action was barred, and the remedy of the bailor in such case was against his bailee as for money had and received to his use. I do not agree with that contention. If both the bailee and the bailor have suffered damage by the wrongful act of a third party, I think that each may bring a separate action for the loss sustained by himself. I cannot understand why a bailee should be allowed to recover damages beyond the extent of his own loss simply because he happened to be in possession.

WILLS, J. It has been contended that because the plaintiff was bailee of a horse to which an injury was done, while in his possession, by a third person, he is entitled to recover from the wrongdoer the amount of the depreciation of the horse, notwithstanding that the injury was inflicted under circumstances which imposed no liability upon the plaintiff as towards his bailor. The mere statement of that proposition is enough to show that it cannot be true.

There are many cases, no doubt, where a bailee in possession of a chattel has recovered, against a stranger wrongfully taking it out of his possession or destroying it, the full value. This might well be the case

if the bailee was liable over to the bailor, or if no one but the bailee were in a position to sue.

The cases that have been cited relate only to the right of a bailee to maintain an action; they have nothing to do with the measure of damages recoverable in such action. A physical interference with possession is a wrong for which undoubtedly a bailee may sue; but it is quite another thing to say that he may recover in such action the same damages as if he were the owner. It has been argued that the bailee may recover as trustee for the bailor; but for that proposition there is no authority: it is wholly repugnant to good sense; and there is certainly no case in which a bailee has recovered damages under such circumstances and been made to account for an unascertained portion of them to his bailor. It has been suggested that the bailor can have no action for damage done to his chattel whilst in the possession of the bailee by the negligence of a third person. It is said such an action must have been in old times an action on the case, and Bayley, J., is cited as having said, in *Rooth v. Wilson*, 1 B. & A. at p. 62, that case is a possessory action. Case, undoubtedly, did lie in many instances in which the plaintiff was in possession of the chattel, the subject of the action; indeed, it was generally so applied where the circumstances which gave rise to the action were not appropriately to be dealt with in trespass or trover. In that sense it was a possessory action. But it certainly was not confined to instances in which the plaintiff was in possession of the chattels injured, and in 2 Chitty on Pleading, p. 580, a form will be found of a declaration in an action in case by a person who had let goods on hire to a third person for injury done to them whilst in the possession of the hirer by the negligence of the defendant. The decision of the County Court judge must, therefore, be affirmed.

*Appeal dismissed; leave to appeal refused.*¹

THE WINKFIELD.

COURT OF APPEAL. 1901.

[Reported [1902] P. 42.]

COLLINS, M. R.² This is an appeal from the order of Sir Francis Jeune dismissing a motion made on behalf of the Postmaster-General in the case of *The Winkfield*.

The question arises out of a collision which occurred on April 5, 1900, between the steamship *Mexican* and the steamship *Winkfield*,

¹ "The case of *Claridge v. South Staffordshire Tramway Co.* may possibly require at some future time further consideration." A. L. SMITH, L. J., in *Meux v. Great Eastern Ry. Co.*, [1895] 2 Q. B. 887, 894. — Ed.

² Only the opinion is here given.

and which resulted in the loss of the former with a portion of the mails which she was carrying at the time.

The owners of the *Winkfield* under a decree limiting liability to 32,514*l.* 17*s.* 10*d.* paid that amount into court, and the claim in question was one by the Postmaster-General on behalf of himself and the Postmasters-General of Cape Colony and Natal to recover out of that sum the value of letters, parcels, &c., in his custody as bailee and lost on board the *Mexican*.

The case was dealt with by all parties in the Court below as a claim by a bailee who was under no liability to his bailor for the loss in question, as to which it was admitted that the authority of *Claridge v. South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422, was conclusive, and the President accordingly, without argument and in deference to that authority, dismissed the claim. The Postmaster-General now appeals.

The question for decision, therefore, is whether *Claridge's Case*, [1892] 1 Q. B. 422, was well decided. I emphasize this because it disposes of a point which was faintly suggested by the respondents, and which, if good, would distinguish *Claridge's Case*, [1892] 1 Q. B. 422, namely, that the applicant was not himself in actual occupation of the things bailed at the time of the loss. This point was not taken below, and having regard to the course followed by all parties on the hearing of the motion, I think it is not open to the respondents to make it now, and I therefore deal with the case upon the footing upon which it was dealt with on the motion, namely, that it is covered by *Claridge's Case*, [1892] 1 Q. B. 422. I assume, therefore, that the subject-matter of the bailment was in the custody of the Postmaster-General as bailee at the time of the accident. For the reasons which I am about to state I am of opinion that *Claridge's Case*, [1892] 1 Q. B. 422, was wrongly decided, and that the law is that in an action against a stranger for loss of goods caused by his negligence, the bailee in possession can recover the value of the goods, although he would have had a good answer to an action by the bailor for damages for the loss of the thing bailed.

It seems to me that the position, that possession is good against a wrongdoer and that the latter cannot set up the *jus tertii* unless he claims under it, is well established in our law, and really concludes this case against the respondents. As I shall show presently, a long series of authorities establishes this in actions of trover and trespass at the suit of a possessor. And the principle being the same, it follows that he can equally recover the whole value of the goods in an action on the case for their loss through the tortious conduct of the defendant. I think it involves this also, that the wrongdoer who is not defending under the title of the bailor is quite unconcerned with what the rights are between the bailor and bailee, and must treat the possessor as the owner of the goods for all purposes quite irrespective of the rights and obligations as between him and the bailor.

I think this position is well established in our law, though it may be

that reasons for its existence have been given in some of the cases which are not quite satisfactory. I think also that the obligation of the bailee to the bailor to account for what he has received in respect of the destruction or conversion of the thing bailed has been admitted so often in decided cases that it cannot now be questioned; and, further, I think it can be shown that the right of the bailee to recover cannot be rested on the ground suggested in some of the cases, namely, that he was liable over to the bailor for the loss of the goods converted or destroyed. It cannot be denied that since the case of *Armory v. Delamirie*, 1 Stra. 504, not to mention earlier cases from the Year Books onward, a mere finder may recover against a wrongdoer the full value of the thing converted. That decision involves the principle that as between possessor and wrongdoer the presumption of law is, in the words of Lord Campbell in *Jeffries v. Great Western Ry. Co.*, 5 E. & B. 802, at p. 806, "that the person who has possession has the property." In the same case he says, 5 E. & B. 802, at p. 805: "I am of opinion that the law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title in himself, is a wrongdoer, and cannot defend himself by showing that there was title in some third person, for *against a wrongdoer possession is title*. The law is so stated by the very learned annotator in his note to *Wilbraham v. Snow*, 2 Wms. Saund. 47 f." Therefore it is not open to the defendant, being a wrongdoer, to inquire into the nature or limitation of the possessor's right, and unless it is competent for him to do so the question of his relation to, or liability towards, the true owner cannot come into the discussion at all; and, therefore, as between those two parties full damages have to be paid without any further inquiry. The extent of the liability of the finder to the true owner not being relevant to the discussion between him and the wrongdoer, the facts which would ascertain it would not have been admissible in evidence, and therefore the right of the finder to recover full damages cannot be made to depend upon the extent of his liability over to the true owner. To hold otherwise would, it seems to me, be in effect to permit a wrongdoer to set up a *jus tertii* under which he cannot claim. But, if this be the fact in the case of a finder, why should it not be equally the fact in the case of a bailee? Why, as against a wrongdoer, should the nature of the plaintiff's interest in the thing converted be any more relevant to the inquiry, and therefore admissible in evidence, than in the case of a finder? It seems to me that neither in one case nor the other ought it to be competent for the defendant to go into evidence on that matter.

I think this view is borne out by authority; for instance, in *Burton v. Hughes*, 2 Bing. 173; 27 R. R. 578, the plaintiff, who had borrowed furniture, and was therefore bailee, was held to be entitled to sue in trover wrongdoers who had seized it without giving in evidence the written agreement under which he held it. The point made for the de-

defendant was that "the qualified interest having been obtained under a written agreement could not be proved except by the production of that agreement duly stamped." The argument on the other side was "that the existence of some kind of interest having been established the precise nature of it or the terms upon which it was acquired were immaterial to the support of this action." Best, C. J., in delivering judgment says: "If this had been a case between Kitchen and the plaintiff the agreement ought to have been produced, because that alone could decide the respective rights of those two parties; but it appears that Kitchen was to supply the plaintiff with furniture, and the question is whether, after he had obtained it, he had a sufficient interest to maintain this action. The case which has been referred to — *Sutton v. Buck*, 2 Taunt. 302; 11 R. R. 585 — confirms what I had esteemed to be the law upon the subject, namely, that a simple bailee has a sufficient interest to sue in trover." By holding, therefore, that the agreement defining the conditions of the plaintiffs' interest was immaterial the Court in effect decided that the right of the bailee, in possession, to sue could not depend upon the fact or extent of his liability over to the bailor, since the plaintiff was allowed to keep his verdict in trover, the agreement defining his interest and liability being excluded from the discussion. In *Sutton v. Buck*, 2 Taunt. 302; 11 R. R. 585, on the authority of which this case was decided, it was held that possession under a general bailment is sufficient title for the plaintiff in trover. The plaintiff had taken possession of a stranded ship under a transfer void for non-compliance with the Register Acts, and he sued the defendant in trover for portions of the timber, wood, and materials of which the defendant had wrongfully taken possession. Sir James Mansfield, C. J., had non-suited the plaintiff, on the ground that the transfer was defective without registration. On motion the non-suit was set aside, Sir James Mansfield being a member of the Court, and a new trial ordered on the ground that the plaintiff had sufficient possession to maintain the action against the wrongdoer. It is true that Chambre, J., reserved his opinion as to the measure of damages, but on the new trial the plaintiff recovered a verdict apparently for the full value of the things converted, and on further motion for a new trial the only point argued was that the defendant was justified as lord of the manor in doing what he did — a contention which was rejected by the Court.

In *Swire v. Leach*, 18 C. B. (N. S.) 479, a pawnbroker, whose landlord had wrongfully taken in distress pledges in the custody of the pawnbroker, was held entitled to recover in an action against the landlord for conversion the full value of the pledges. This case was decided by a strong Court, consisting of Erle, C. J., Williams and Keating, JJ., and has never, so far as I know, been questioned since. The duty of the bailee to account to the bailor was recognized as well established. See also *Turner v. Hardcastle*, 11 C. B. (N. S.) 683, a considered judgment of the Court of Common Pleas, which included Willes, J., who had not been a party to *Swire v. Leach*, 18 C. B.

(N. S.) 479, and where the bailee's right to recover full damages and his obligation to account to the bailor is again affirmed.

The ground of the decision in *Claridge's Case*, [1892] 1 Q. B. 422, was that the plaintiff in that case, being under no liability to his bailor, could recover no damages, and though for the reasons I have already given I think this position is untenable, it is necessary to follow it out a little further. There is no doubt that the reason given in *Heydon and Smith's Case*, 13 Rep. 69 — and itself drawn from the Year Books — has been repeated in many subsequent cases. The words are these: "Clearly, the bailee, or he who hath a special property, shall have a general action of trespass against a stranger, and shall recover all in damages because that he is chargeable over."

It is now well established that the bailee is accountable, as stated in the passage cited and repeated in many subsequent cases. But whether the obligation to account was a condition of his right to sue, or only an incident arising upon his recovery of damages, is a very different question, though it was easy to confound one view with the other.

Holmes, C. J., in his admirable lectures on the Common Law, in the chapter devoted to bailments, traces the origin of the bailee's right to sue and recover the whole value of chattels converted, and arrives at the clear conclusion that the bailee's obligation to account arose from the fact that he was originally the only person who could sue, though afterwards by an extension, not perhaps quite logical, the right to sue was conceded to the bailor also. He says, at p. 167: "At first the bailee was answerable to the owner because he was the only person who could sue; now it was said he could sue because he was answerable to the owner." And again at p. 170: "The inverted explanation of Beaumanoir will be remembered, that the bailee could sue because he was answerable over, in place of the original rule that he was answerable over so strictly because only he could sue." This inversion, as he points out, is traceable through the Year Books, and has survived into modern times, though, as he shows, it has not been acted upon. Pollock and Maitland's *History of English Law*, vol. 2, p. 170, puts the position thus: "Perhaps we come nearest to historical truth if we say that between the two old rules there was no logical priority. The bailee had the action because he was liable, and was liable because he had the action." It may be that in early times the obligation of the bailee to the bailor was absolute, that is to say, he was an insurer. But long after the decision of *Coggs v. Bernard*, (1704) 2 Ld. Raym. 909, which classified the obligations of bailees, the bailee has, nevertheless, been allowed to recover full damages against a wrongdoer, where the facts would have afforded a complete answer for him against his bailor. The cases above cited are instances of this. In each of them the bailee would have had a good answer to an action by his bailor; for in none of them was it suggested that the act of the wrongdoer was traceable to negligence on the part of the bailee. I think,

therefore, that the statement drawn, as I have said, from the Year Books may be explained, as Holmes, C. J., explains it, but whether that be the true view of it or not, it is clear that it has not been treated as law in our Courts. Upon this, before the decision in *Claridge's Case*, [1892] 1 Q. B. 422, there was a strong body of opinion in text-books, English and American, in favor of the bailee's unqualified right to sue the wrongdoer: see Mayne on Damages, 4th ed. p. 381, and cases there cited; Sedgwick on Damages, 7th ed. vol. 1, p. 61, n. (a); Story on Bailments, 9th ed. s. 352; Kent's Commentaries, 12th ed. vol. 2, p. 568, n. (e); Pollock on Torts, 6th ed. pp. 354, 355; Addison on Torts, 7th ed. p. 523; and, as I have already pointed out, Williams, J., the editor of Williams' Saunders, was a party to the decision of *Swire v. Leach*, 18 C. B. (N. S.) 479. [See also Mr. Justice Wright in Pollock and Wright on Possession, p. 166.] The bailee's right to recover has been affirmed in several American cases entirely without reference to the extent of the bailee's liability to the bailor for the tort, though his obligation to account is admitted — see them referred to in the passages cited, and in particular see *Ullman v. Barnard*, (1856) 73 Mass. Rep. 554; *Parish v. Wheeler*, (1860) 22 New York Rep. 494; *White v. Webb*, 15 Conn. Rep. 302. The case of *Rooth v. Wilson*, 1 B. & A. 59, is a clear authority that the right of the bailee in possession to recover against a wrongdoer is the same in an action on the case as in an action of trover, if indeed authority were required for what seems obvious in point of principle. There the gratuitous bailee of a horse was held entitled to recover the full value of the horse in an action on the case against a defendant by whose negligence the horse fell and was killed. The case was decided by Lord Ellenborough, C. J., Bayley, Abbott, and Holroyd, JJ. The three latter seem to me to put it wholly on the ground that the plaintiff was in possession and the defendant a wrongdoer. Abbott, J., says shortly: "I think that the same possession which would enable the plaintiff to maintain trespass would enable him to maintain this action"; and Bayley, J., points out that case is a possessory action. But Lord Ellenborough undoubtedly rests his judgment on the view that the plaintiff would himself have been responsible in damages to his bailor to a commensurate amount. This, no doubt, was his personal view, but it was not the decision of the Court, and, as I have pointed out, it has certainly not been acted upon in subsequent cases. Therefore, as I said at the outset, and as I think I have now shown by authority, the root principle of the whole discussion is that, as against a wrongdoer, possession is title. The chattel that has been converted or damaged is deemed to be the chattel of the possessor and of no other, and therefore its loss or deterioration is his loss, and to him, if he demands it, it must be recouped. His obligation to account to the bailor is really not *ad rem* in the discussion. It only comes in after he has carried his legal position to its logical consequence against a wrongdoer, and serves to soothe a mind disconcerted by the notion that a person who is not him-

self the complete owner should be entitled to receive back the full value of the chattel converted or destroyed. There is no inconsistency between the two positions; the one is the complement of the other. As between bailee and stranger possession gives title — that is, not a limited interest, but absolute and complete ownership, and he is entitled to receive back a complete equivalent for the whole loss or deterioration of the thing itself. As between bailor and bailee the real interests of each must be inquired into, and, as the bailee has to account for the thing bailed, so he must account for that which has become its equivalent and now represents it. What he has received above his own interest he has received to the use of his bailor. The wrongdoer, having once paid full damages to the bailee, has an answer to any action by the bailor. See *Com. Dig. Trespass, B. 4*, citing *Roll. 551, l. 31, 569, l. 22*, *Story on Bailments, 9th ed. s. 352*, and the numerous authorities there cited.

The liability by the bailee to account is also well established — see the passage from Lord Coke, and the cases cited in the earlier part of this judgment — and therefore it seems to me that there is no such preponderance of convenience in favor of limiting the right of the bailee as to make it desirable, much less obligatory, upon us to modify the law as it rested upon the authorities antecedent to *Claridge's Case*, [1892] 1 Q. B. 422. I am aware that in two able text-books, Beven's *Negligence in Law and Clerk and Lindsell on Torts*, the decision in *Claridge's Case*, [1892] 1 Q. B. 422, is approved, though it is there pointed out that the authorities bearing the other way were not fully considered. The reasons, however, which they give for their opinions seem to be largely based upon the supposed inconvenience of the opposite view; nor are the arguments by which they distinguish the position of bailees from that of other possessors to my mind satisfactory. *Claridge's Case*, [1892] 1 Q. B. 422, was treated as open to question by the late Master of the Rolls in *Meux v. Great Eastern Ry. Co.*, [1895] 2 Q. B. 387, and, with the greatest deference to the eminent judges who decided it, it seems to me that it cannot be supported. It seems to have been argued before them upon very scanty materials. Before us the whole subject has been elaborately discussed, and all, or nearly all, the authorities brought before us in historical sequence.

Appeal allowed.

Sir Robert Finlay, A. G., and Acland, for the Postmaster-General.

Pickford, K. C., and Lauriston Batten, for the respondents, cargo claimants.

NOTE ON JUDICIAL PROCESS. — At common law, the goods of a judgment debtor were "bound" from the *teste* of the writ of execution. That is, although the property in or title to the goods remained in the debtor until a sale by the sheriff, after the *teste* of the writ the debtor could not dispose of them so as to prevent their being taken in execution, except by a sale in market overt. Note to *Wheatley v. Lane*, 1 Wms. Saund. 219 (g). And see *Preston v. Surgoine*, Peck (Tenn.), 72; *Berry v. Clements*, 9 Humph. 312; *Rocco v. Parczyk*, 9 Lea, 328. By the Statute of Frauds

(29 C. II. c. 3, § 16) it was provided that the judgment should bind the goods only from the time of the delivery of the writ to the sheriff; which time was to be endorsed on the writ. In the United States, in a number of jurisdictions, the law is like that of England under the Statute of Frauds. This result has generally been reached by legislation, sometimes adopting the English statute. See *Hotchkiss v. McVickar*, 12 Johns. 403; *Duncan v. M'Cumbar*, 10 Watts, 212; *Prentiss, &c. Co. v. Whitman, &c. Co.*, 88 Md. 240; *Gott v. Williams*, 29 Mo. 461.

In such jurisdictions after delivery of the writ of execution to the sheriff, the lien of the execution cannot be defeated by a sale of the goods before they are actually seized. *Newell v. Sibley*, 1 Southard, 381. Nor can an artisan acquire a lien on the goods for services performed on them. *McCrisaken v. Osweiler*, 70 Ind. 131.

But statute sometimes relaxes the rule in favor of innocent purchasers. See *Moses v. Thomas*, 2 Dutch. 124. Until the officer levies upon the goods, he can maintain no action against a stranger who interferes with them. *Hotchkiss v. McVickar*, 12 Johns. 403; *Mulheiser v. Lane*, 82 Ill. 117.

In some other jurisdictions, by common law or by legislation, the rights of a judgment debtor are unaffected until the actual levy of the execution. See *Reeves v. Sebern*, 16 Iowa, 234; *Albrecht v. Long*, 25 Minn. 163; *Knox v. Webster*, 18 Wis. 406. In *Reeves v. Sebern*, *supra*, it was said that the common-law rule is unjust and not in accord with the policy of our laws.

After the officer has actually seized property subject to seizure, he may maintain all the actions available by one lawfully in possession of goods against a stranger who interferes with them. *Wilbraham v. Snow*, 2 Saund. 47. Or against the defendant in the action in which the seizure is made. *Williams v. Herndon*, 12 B. Mon. 484. Or against the plaintiff in the action. *Garner v. Willis*, Breese (II.), 368. And of course, if an action is brought against him, the sheriff can defend on his right under the writ. *Martin v. Watson*, 8 Wis. 315.

But the title to the goods seized is not changed; the defendant to the process can still convey or mortgage them, the title of the purchaser or mortgagee being subject to divestment by sale or other execution of the process. *Bates v. Gest*, 3 McCord, 493.

In general, property which has been seized on process by one officer cannot be taken from his custody under process held by another officer. As to when goods are *in custodia legis*, see Freeman, Executions (3d ed.), §§ 129-135; Cobbe, Replevin (2d ed.), c. 13.

The officer, while in the possession of the goods, has no right to use them for his own personal advantage; his duty is to keep them safely to be sold or otherwise disposed of under the process. *Banker v. Caldwell*, 3 Minn. 94, 104.

When the process has been satisfied without sale of the goods seized, or when the process has been set aside, the right of the officer to hold the goods against their owner ceases, and the owner is entitled to possession. It has been held in New York that in such case the owner cannot maintain replevin against the officer. *Gardner v. Campbell*, 15 Johns. 401. But this decision was disapproved in *Baker v. Fales*, 16 Mass. 147, 153. See *Banker v. Caldwell*, 3 Minn. 94, 104. After the legal process is satisfied or set aside, the officer cannot maintain replevin against one to whom he had confided the goods for safe-keeping. *Walpole v. Smith*, 4 Blackf. 304. But he may recover in an action against a stranger who takes the goods from him. *McClintock v. Graham*, 3 McCord, 243. If the officer abandons the goods after seizure, he cannot thereafter maintain an action against a stranger who takes them. *Blades v. Arundale*, 1 M. & S. 711.

On the subject of Trespass *ab initio*, see Ames, Cas. Torts, 247 *et seq.*; Ames, "History of Trover," 11 Harv. Law Rev. 287-9; *Boston & Maine R. R. v. Small*, 85 Me. 462.

NOTE ON DISTRESS. — Rights in personal property may sometimes be acquired without the consent of the owner and without the aid of legal process. An ancient example of this is found in the law of distress. Distresses were chiefly of two kinds: for rent in arrear, and of things *damage feasant*. In the first case, the landlord could

seize chattels found on the premises demised, and in the other the owner of the soil could seize the chattel doing damage; and the property could be held in each case until satisfaction was made.

Distress for Rent in Arrear. — The relation of landlord and tenant must exist. There must be an actual demise (*Dunk v. Hunter*, 5 B. & Ald. 322), of a corporeal hereditament (Co. Lit. 142a), at a rent certain or which may be made certain (*Melick v. Benedict*, 43 N. J. L. 425). As the relation of landlord and tenant is a requisite, this remedy was unavailable for the last instalment of rent upon a lease, unless the lessor reserved the payment at an earlier day than the last of the term. Statute 8 Anne, c. 14, §§ 6, 7, extended the time within which a distress could be levied in such case. Taylor, L. & T. (8th ed.) § 572. In some of the States, the landlord may distrain before the rent is due, if the tenant is seeking to remove his goods. 1 Stim. Am. Stat. Law, § 2032. When rent is payable in advance, a distress may be levied when the rent is due. *Buckley v. Taylor*, 2 T. R. 600.

A distress can be made only on the premises demised. *Poole v. Longueville*, 2 Saund. 282, 284, note 2; Taylor, §§ 574–5. But in some of the States, by statute, the distress may be levied anywhere within the county. See *Kellogg Newspaper Co. v. Peterson*, 162 Ill. 158, 161. By statute 11 G. II. c. 19, the landlord could follow the goods of the tenant which had been secretly and fraudulently removed to avoid a distress. See Taylor, §§ 576–7. At common law, not only the tenant's goods, but also those of an under-tenant or a stranger, upon the premises, were subject to be distrained. Gilbert, *Distresses* (4th ed.), 35. This rule has been relaxed in England as to lodgers by 34 & 35 Vict. c. 79, and in some of the American States as to strangers in general. See Taylor, §§ 583–4. As to what chattels were absolutely or conditionally exempt from distress at common law, see Bullen, *Distress* (2d ed.), c. 3. Statutes have added to these. Taylor, §§ 585–6.

A distress can be made only between sunrise and sunset. *Tutton v. Darke*, 5 H. & N. 647.

As to distress after the death of the landlord for rent accrued during his life, see Bullen, 66.

Before seizure by the landlord, he has no interest in the goods, and they may be sold by the tenant and removed by the buyer. *Kellogg Newspaper Co. v. Peterson*, 162 Ill. 158. Even after seizure, the landlord, it seems, cannot maintain trespass or trover against one who takes the goods from him; his remedy was by a writ of *rescous* if the goods were taken on the way to the pound, and by writ of *parco fracta*, if taken out of the pound. *Rex v. Cotton*, Parker, 112, 121; Ames, "History of Trover," 11 Harv. Law Rev. 374; *Iredale v. Kendall*, 40 L. T. n. s. 362. This seems to be still the law; but statute 2 W. & M. sess. 1, c. 5, gave a special action on the case with treble damages to persons grieved by a pound breach or rescue of chattels distrained for rent. See Oldham & Foster, *Distress* (2d ed.), 315, 316. If the goods are replevied from the landlord, his lien is gone, and he must seek his remedy on the replevin bond. *Bradyll v. Ball*, 1 Bro. C. C. 427; *Speer v. Skinner*, 35 Ill. 282, 299 *et seq.* But in *Harris v. Clayton*, 1 McMullan, 194, it was held that if the identical goods distrained are still in the hands of the tenant, they may be retaken on a judgment of *retorno habendo*.

As to the landlord's duty to impound the distress, see Bullen, c. 4, § 4; Taylor, § 605.

Tender of the rent due, upon the land before distress made, makes the distress wrongful; tender after the distress, and before the impounding, makes the detainer, and not the taking, wrongful; but tender after the impounding makes neither the one nor the other wrongful. *Six Carpenters' Case*, 8 Rep. 146a, 147a.

At common law, any irregularity committed in the proceedings rendered the distrainer a trespasser *ab initio*. But statute 11 G. II. c. 19, § 19, provided that for irregularities in levying a distress for rent justly due, the party injured shall be entitled only to recover compensation in damages. Bullen, 218; Taylor, §§ 613, 776.

In the absence of mistake as to the value of the goods seized, only one distress can be made for an entire rent, if there are goods on the premises sufficient to answer the debt. Bullen, 129.

As to the remedies for wrongful, irregular, or excessive distresses, see Bullen, c. 6.

At common law, the landlord could not sell the chattels distrained; he could only retain possession of them, to compel payment of the rent. But statutes generally confer a power of sale upon the distrainor. Bullen, 181; Taylor, § 609.

A common-law distress is not an action at law. Buller, N. P. 181. And it has been said that this remedy is not within the Statute of Limitations. *Blake v. De Liesseline*, 4 McCord, 496, 500. But in some jurisdictions the time within which a distress may be levied is fixed by statute. 1 Stim. Am. Stat. Law, § 2032.

In some of the States, distress has never existed; and in others it has been abolished. See Taylor, § 558; Stim. Am. Stat. Law, § 2031.

At common law, the landlord could distrain in person, or appoint a private person his bailiff to act for him. Bullen, 149; Taylor, § 579. But statutory regulations tend to confine this power to legal officers.

Distress of Things Damage Feasant. — Where cattle or other chattels encumber land or otherwise damage it, they may be distrained by the owner of the soil though he has no interest in the herbage, for the injury done to his other interests in the land (*Hoskins v. Robins*, 2 Saund. 323, 328), or by the lessee of the herbage for the injury thereto (*Burt v. Moore*, 5 T. R. 329), or by a commoner (*Mary's Case*, 9 Rep. 111 b, 112 b). In *Boden v. Roscoe*, [1894] 1 Q. B. 608, it was held that a trespassing animal might be distrained for injuries not only to the freehold but to other animals also. Inanimate chattels may be distrained damage feasant; e. g., a locomotive. See *Ambergate, f.c. Ry. Co. v. Midland Ry. Co.*, 2 E. & B. 793. It seems that a chattel which came on the land lawfully may be distrained if it remains there unlawfully. Noy's Maxims, *43.

The chattels must be seized before they leave the premises. If they leave and return, they cannot be distrained for the damage done on their former entry. See *Vaspor v. Edwards*, 12 Mod. 658, 661; *Warring v. Cripps*, 23 Wis. 460. And cf. *Wormer v. Biggs*, 2 C. & K. 81. In England and under some American statutes the chattel cannot be seized upon the highway. Stat. Marlbridge (52 H. III.), c. 15; *Lyons v. Martin*, 8 A. & E. 512. In other States, statutes give a more extended right. *Pettit v. May*, 34 Wis. 666, 672. Even if the owner of the cattle drive them away in sight of the owner of the land who is coming to distrain them damage feasant, no distress can be made. Co. Lit. 161 a.

Distress of things damage feasant may be made in the night-time. Co. Lit. 142 a.

The rule as to tender is like that in distress for rent. Bullen, 268.

The only common-law exemption from distress damage feasant seems to be that of a horse on which its owner is riding. *Storey v. Robinson*, 6 T. R. 188. The statute 2 W. & M. sess. 1, c. 5, *supra*, applied only to a distress for rent. In case of pound breach or rescue of a distress damage feasant, the only remedies are by writ of *rescous* or *de parco fracto*, at common law. Oldham & Foster, *Distress* (2d ed.), 316.

In America the subject is generally regulated by statutes concerning Estrays.

As to whether one who distrains for rent or for damage done may at the same time bring an action for the injury, see Bullen, 267; *Colden v. Eldred*, 15 Johns. 220.

SECTION II.

FINDING.

A. *Rights of Finder against Owner.*

MULGRAVE v. OGDEN.

QUEEN'S BENCH. 1591.

[Reported Cro. Eliz. 219.]

ACTION sur trover of twenty barrels of butter; and counts that he *tam negligenter custodivit* that they became of little value. Upon this it was demurred, and held by all the justices, that no action upon the case lieth in this case; for no law compelleth him that finds a thing to keep it safely; as if a man finds a garment, and suffers it to be moth-eaten; or if one find a horse and giveth it no sustenance; but if a man find a thing and useth it, he is answerable, for it is conversion. So if he of purpose misuseth it, as if one finds paper, and puts it into the water, &c.; but for negligent keeping no law punisheth him. *Et adjournatur.*¹

BINSTEAD v. BUCK.

COMMON PLEAS. 1776.

[Reported 2 W. Bl. 1117.]

TROVER for a pointing dog. The plaintiff proved the dog to be his property, and that it was found at the defendant's house twelve months after it was lost. The defendant said the dog strayed there casually,

¹ "When a man doth finde goods, it hath been said, and so commonly held, that if he doth dis-possess himself of them, by this he shall be discharged, but this is not so, as appears by 12 E. 4, fol. 13, for he which findes goods, is bound to answer him for them who hath the property; and if he deliver them over to any one, unless it be unto the right owner, he shall be charged for them, for at the first it is in his election, whether he will take them or not into his custody, but when he hath them, one onely hath then right unto them, and therefore he ought to keep them safely; if a man therefore which findes goods, if he be wise, he will then search out the right owner of them, and so deliver them unto him; if the owner comes unto him, and demands them, and he answers him, that it is not known unto him whether he be the true Owner of the goods, or not, and for this cause he refuseth to deliver them; this refusal is no conversion, if he do keep them for him." "If a man findes goods, an Action upon the Case lieth, for his ill and negligent keeping of them, but no Trover and Conversion, because this is but a *non fessans*." Per COKE, C. J., in *Isaack v. Clark*, 2 Bulst. 306, 312 (1615). See *Wood v. Pierson*, 45 Mich. 313.

and demanded 20s. for twenty weeks' keep, before he would deliver up the dog. A verdict for the plaintiff, subject to the opinion of the court, whether this refusal amounted to a conversion of the dog?

Foster, for the defendant, declined arguing the question, and so
Postea to the plaintiff.

NICHOLSON v. CHAPMAN.

COMMON PLEAS. 1793.

[Reported 2 H. Bl. 254.]

THIS was an action of trover brought under the following circumstances: A considerable quantity of timber, the property of the plaintiff, was placed in a dock on the banks of the Thames, but the ropes with which it was fastened accidentally getting loose it floated, and was carried by the tide as far as Putney, and there left at low water upon a towing-path within the manor of Wimbledon. Being found in this situation, the bailiff of the manor, one Fairchild, employed the defendant Chapman to remove the timber with his wagon from the towing-path, which it obstructed, to a place of safety at a little distance. This Chapman accordingly did, and when the plaintiff sent to demand the timber to be restored to him, refused to deliver it up, unless £6 10s. 4d. were paid, which he claimed partly by way of salvage, as a customary right due to the lord of the manor, and partly as a recompense to himself for the trouble of drawing the timber from the water side to the place where it then lay; but this demand the plaintiff refused to comply with, and did not tender any other sum. The bailiff acted under the following order, made at a court leet of the lord of the manor in May, 1792: "Complaint having been made to this court of the great detriment arising to the tenants, &c., within this manor from timber having been left by the tide upon the towing-path within the same; it is ordered that Francis Fairchild, the bailiff of this manor, do under the authority of this court, remove the same to a proper place of safety until the lord or his steward shall give proper directions for the benefit of the particular owner or proprietor thereof." But no such customary right as was set up in the lord, was established at the trial; the Lord Chief Justice therefore directed the jury to ascertain what they thought a proper compensation for the carriage of the timber by the defendant as above stated. They answered that two guineas were a reasonable sum for that purpose, upon which it was agreed that a verdict should be found for the plaintiff for the value of the timber, subject to the opinion of the court on the question, Whether there ought not to have been a tender of two guineas before action brought? if the court should be of that opinion, the verdict to be entered for the defendant, he under-

taking to deliver up the timber on payment of two guineas ; but if they should be of a contrary opinion, then the verdict to be entered for the plaintiff for the value.

Adair and Runnington, Serjts., on part of the plaintiff.

Bond and Clayton, Serjts., argued on the other side.

LORD CHIEF JUSTICE EYRE. The only difficulty that remained with any of us, after we had heard this case argued, was upon the question, Whether this transaction could be assimilated to salvage ? The taking care of goods left by the tide upon the banks of a navigable river, communicating with the sea, may in a vulgar sense be said to be salvage ; but it has none of the qualities of salvage, in respect of which the laws of all civilized nations, the laws of *Oleron*, and our own laws in particular, have provided that a recompense is due for the saving, and that our law has also provided that this recompense should be a lien upon the goods which have been saved. Goods carried by sea are necessarily and unavoidably exposed to the perils which storms, tempests, and accidents (far beyond the reach of human foresight to prevent), are hourly creating, and against which it too often happens that the greatest diligence and the most strenuous exertions of the mariner cannot protect them. When goods are thus in imminent danger of being lost, it is most frequently at the hazard of the lives of those who save them, that they are saved. Principles of public policy dictate to civilized and commercial countries, not only the propriety, but even the absolute necessity of establishing a liberal recompense for the encouragement of those who engage in so dangerous a service.

Such are the grounds upon which salvage stands ; they are recognized by Lord Chief Justice Holt in the case which has been cited from Lord Raymond and Salkeld. 1 Ld. Raym. 393 ; Salk. 654, pl. 2. But see how very unlike this salvage is to the case now under consideration. In a navigable river within the flux and reflux of the tide, but at a great distance from the sea, pieces of timber lie moored together in convenient places ; carelessness, a slight accident, perhaps a mischievous boy, casts off the mooring rope, and the timber floats from the place where it was deposited, till the tide falls, and leaves it again somewhere upon the banks of the river. Such an event as this gives the owner the trouble of employing a man, sometimes for an hour, and sometimes for a day, in looking after it till he finds it, and brings it back again to the place from whence it floated. If it happens to do any damage, the owner must pay for that damage ; it will be imputable to him as carelessness, that his timber in floating from its moorings is found damage feasant, if that should happen to be the case. But this is not a case of damage feasance ; the timber is found lying upon the banks of the river, and is taken into the possession and under the care of the defendant without any extraordinary exertions, without the least personal risk, and in truth with very little trouble. It is therefore a case of mere finding and taking care of the thing found (I am willing to agree) for the owner. This is a good office, and meri-

torious, at least in the moral sense of the word, and certainly entitles the party to some reasonable recompense from the bounty, if not from the justice of the owner ; and of which, if it were refused, a court of justice would go as far as it could go towards enforcing the payment.¹ So it would if a horse had strayed, and was not taken as an estray by the lord under his manorial rights, but was taken up by some good-natured man and taken care of by him, till at some trouble, and perhaps at some expense, he had found out the owner. So it would be in every other case of finding that can be stated (the claim to the recompense differing in degree, but not in principle) ; which therefore reduces the merits of this case to this short question, Whether every man who finds the property of another which happens to have been lost or mislaid, and voluntarily puts himself to some trouble and expense to preserve the thing and to find out the owner, has a lien upon it for the casual, fluctuating, and uncertain amount of the recompense which he may reasonably deserve? It is enough to say that there is no instance of such a lien having been claimed and allowed ; the case of a pointer dog, 2 Black. 1117, was a case in which it was claimed and disallowed, and it was thought too clear a case to bear an argument. Principles of public policy and commercial necessity support the lien in the case of salvage. Not only public policy and commercial necessity do not require that it should be established in this case, but very great inconvenience may be apprehended from it if it were to be established. The owners of this kind of property, and the owners of craft upon the river, which lie in many places moored together in large numbers, would not only have common accidents from the carelessness of their servants to guard against, but also the wilful attempts of ill-designing people to turn their floats and vessels adrift in order that they might be paid for finding them. I mentioned in the course of the cause another great inconvenience, namely, the situation in which an owner, seeking to recover his property in an action of trover, will be placed, if he is at his peril to make a tender of a sufficient recompense before he brings his action ; such an owner must always pay too much, because he has no means of knowing exactly how much he ought to pay, and because he must tender enough. I know there are cases in which the owner of property must submit to this inconvenience ; but the number of them ought not to be increased ; perhaps it is better for the public that these voluntary acts of benevolence from one man to another, which are charities and moral duties, but not legal duties, should depend altogether for their reward upon the moral duty of gratitude. But at any rate, it is fitting that he who claims the reward in such case should take upon himself the burthen of proving the nature of the service which he has performed, and the quantum of the recompense which he

¹ It seems probable that in such a case, if any action could be maintained, it would be an action of assumpsit for work and labor, in which the court would imply a special instance and request, as well as a promise. On a *quantum meruit*, the reasonable extent of the recompense would come properly before a jury. REP.

demands, instead of throwing it upon the owner to estimate it for him, at the hazard of being nonsuited in an action of trover.

*Judgment for the plaintiff.*¹

WENTWORTH v. DAY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1841.

[*Reported 3 Met. 352.*]

THIS action, which was trover for a watch, was submitted to the court on the following statement of facts:—

The plaintiff lost the watch mentioned in his declaration, about the middle of October, 1839, in Bradford, in the county of Essex, and put the following advertisement into the “Essex Banner,” a newspaper published at Haverhill, in said county: “Twenty dollars reward. Lost, upon the road from Haverhill to Brighton, about two miles from Haverhill Bridge, a gold lever watch. Whoever will return it to this office shall receive the above reward. Francis Wentworth. Oct. 12.”

The watch was found, a few days afterwards, by a minor son of the defendant, who delivered it to the defendant, and he took the custody of it for his son, and very soon afterwards left it at the printing office of the “Banner,” in the care of the printer, with directions to deliver it to the owner, on his paying the twenty dollars reward.

In the month of January, 1840, the plaintiff returned to Haverhill, and on his refusing to pay the twenty dollars, the defendant resumed the possession of the watch, and while it was thus in his possession, the plaintiff demanded it of him, but he refused to deliver it, unless the plaintiff would pay him the twenty dollars for his son. The plaintiff refused to do this, but said he would pay ten dollars. The defendant refused to deliver the watch, and the plaintiff brought this action.

E. Ames, for the plaintiff.

Homer, for the defendant.

SHAW, C. J. Although the finder of lost property on land has no right of salvage, at common law, yet if the loser of property, in order to stimulate the vigilance and industry of others to find and restore it, will make an express promise of a reward, either to a particular person, or in general terms to any one who will return it to him, and, in consequence of such offer, one does return it to him, it is a valid contract. Until something is done in pursuance of it, it is a mere offer, and may be revoked. But if, before it is retracted, one so far complies with it

¹ See *Reeder v. Anderson*, 4 Dana, 193; *Preston v. Neale*, 12 Gray, 222; *Chase v. Corcoran*, 106 Mass. 286; *Tome v. Four Cribs of Lumber*, Taney, 533; *Amory v. Flynn*, 10 Johns. 102; *Sheldon v. Sherman*, 42 N. Y. 484; *Etter v. Edwards*, 4 Watts, 63, 66; *Watts v. Ward*, 1 Oreg. 86. As to finder of a public document, see *De la O v. Acoma*, 1 N. M. 226, 236.

as to perform the labor for which the reward is stipulated, it is the ordinary case of labor done on request, and becomes a contract to pay the stipulated compensation. It is not a gratuitous service, because something is done which the party was not bound to do, and without such offer might not have done. *Symmes v. Frazier*, 6 Mass. 344.

But the more material question is, whether, under this offer of reward, the finder of the defendant's watch, or the father, who acted in his behalf and stood in his right, had a lien on the watch, so that he was not bound to deliver it till the reward was paid.

A lien may be given by express contract, or it may be implied from general custom, from the usage of particular trades, from the course of dealing between the particular parties to the transaction, or from the relations in which they stand, as principal and factor. *Green v. Farmer*, 4 Bur. 2221. In *Kirkman v. Shawcross*, 6 T. R. 14, it was held, that where certain dyers gave general notice to their customers, that on all goods received for dyeing, after such notice, they would have a lien for their general balance, a customer dealing with such dyers, after notice of such terms, must be taken to have assented to them, and thereby the goods became charged with such lien, by force of the mutual agreement. But in many cases the law implies a lien, from the presumed intention of the parties, arising from the relation in which they stand. Take the ordinary case of the sale of goods, in a shop or other place, where the parties are strangers to each other. By the contract of sale the property is considered as vesting in the vendee; but the vendor has a lien on the property for the price, and is not bound to deliver it till the price is paid. Nor is the purchaser bound to pay till the goods are delivered. They are acts to be done mutually and simultaneously. This is founded on the legal presumption that it was not the intention of the vendor to part with his goods till the price should be paid, nor that of the purchaser to part with his money till he should receive the goods. But this presumption may be controlled by evidence proving a different intent, as that the buyer shall have credit, or the seller be paid in something other than money.

In the present case, the duty of the plaintiff to pay the stipulated reward arises from the promise contained in his advertisement. That promise was, that whoever should return his watch to the printing office should receive twenty dollars. No other time or place of payment was fixed. The natural, if not the necessary implication, is that the acts of performance were to be mutual and simultaneous,—the one to give up the watch, on payment of the reward; the other to pay the reward, on receiving the watch. Such being, in our judgment, the nature and legal effect of this contract, we are of opinion that the defendant, on being ready to deliver up the watch, had a right to receive the reward, in behalf of himself and his son, and was not bound to surrender the actual possession of it, till the reward was paid; and therefore a refusal to deliver it, without such payment, was not a conversion.

It was competent for the loser of the watch to propose his own terms.

He might have promised to pay the reward at a given time after the watch should have been restored, or in any other manner inconsistent with a lien for the reward on the article restored; in which case, no such lien would exist. The person restoring the watch would look only to the personal responsibility of the advertiser. It was for the latter to consider whether such an offer would be equally efficacious in bringing back his lost property, as an offer of a reward secured by a pledge of the property itself; or whether, on the contrary, it would not afford to the finder a strong temptation to conceal it. With these motives before him, he made an offer to pay the reward on the restoration of the watch; and his subsequent attempt to get the watch, without performing his promise, is equally inconsistent with the rules of law and the dictates of justice.

The circumstance, in this case, that the watch was found by the defendant's son, and by him delivered to his father, makes no difference. Had the promise been to pay the finder, and the suit were brought to recover the reward, it would present a different question. Here the son delivered the watch to the father, and authorized the father to receive the reward for him. If the son had a right to detain it, the father had the same right, and his refusal to deliver it to the owner, without payment of the reward, was no conversion.

*Judgment for the defendant.*¹

WILSON v. GUYTON.

COURT OF APPEALS OF MARYLAND. 1849.

[Reported 8 Gill, 213.]

APPEAL from Harford County Court.

This was an action of replevin, instituted by the appellee, for the recovery of a horse which had strayed from the possession of the plaintiff, and had been taken up by one William H. Pearce, and was retained by the defendant as Pearce's agent. The plea was *non cepit*.

At the trial, the defendant proved that the plaintiff was the owner of the horse in question, and that having lost said horse in the month of July, 1847, the plaintiff offered a liberal reward, by advertisement, to any one who would take up said horse, and deliver him to the plaintiff; and that said Pearce, after said advertisement, and in consequence thereof, took up said horse, and offered to deliver him to the plaintiff, upon said plaintiff's paying \$3, as the reward for such taking up. He also further proved, that plaintiff admitted that the sum of \$3 was a reasonable reward, and within the terms of the advertisement, and that defendant held said horse at the time the writ was issued in this case,

¹ *Cummings v. Gann*, 52 Pa. 484, accord.

as the agent of said Pearce. The defendant then prayed the court to direct the jury, "that unless the plaintiff proved, or offered proof that he had, before the institution of this suit, paid the said \$3, the reward aforesaid, or tendered or offered to pay the same, the said plaintiff is not entitled to recover." Which direction the court (*Archer*, C. J., and *Purviance*, A. J.) refused to give, but instructed the jury, that the said William H. Pearce had no right to retain said horse till the said reward was paid. The defendant excepted, and the verdict and judgment being against him, appealed to this court.

The cause was argued before DORSEY, C. J., CHAMBERS, SPENCE, MAGRUDER, MARTIN, and FRICK, JJ.

By *Otho Scott*, for the appellant, and

By *H. W. Archer*, for the appellee.

DORSEY, C. J., delivered the opinion of this court. The doctrine of lien is more favored now than formerly ; and it is now recognized as a general principle, that wherever the party has, by his labor or skill, &c., improved the value of property placed in his possession, he has a lien upon it until paid. And liens have been implied when, from the nature of the transaction, the owner of the property is assumed as having designed to create them, or when it can be fairly inferred, from circumstances, that it was the understanding of the parties that they should exist. The existence of liens has also been sustained where they contributed to promote public policy and convenience. If any article of personal property has been lost, or strayed away, or escaped from its owner, and he offers a certain reward, payable to him who shall recover and deliver it back to his possession, it is but a just exposition of his offer, that he did not expect that he who had expended his time and money in the pursuit and recovery of the lost or escaped property, would restore it to him, but upon the payment of the proffered reward, and that as security for this, he was to remain in possession of the same until its restoration to its owner, and then the payment of the reward was to be a simultaneous act. It is no forced construction of his act, to say that he designed to be so understood by him who should become entitled to the reward. It is, consequently, a lien created by contract. It is for the interest of property holders so to regard it. It doubles their prospect of a restoration to their property. To strangers it is everything ; for few, indeed, would spend their time and money, and incur the risks incident to bailment, but from a belief in the existence of such a lien. Public convenience, sound policy, and all the analogies of the law, lend their aid in support of such a principle. Nor are we without an express authority upon this subject. In *Wentworth v. Day*, 3 Metcalf, 352, the Supreme Court of Massachusetts decided, "that a finder of lost property, for the restoration of which the owner has offered a reward, has a lien on the property, and may retain possession of it, if, on his offer to restore it, the owner refuses to pay the reward."

But, in the case before us, there is no ground for the implication of

such a lien from the compact of the parties. There was no fixed or certain reward offered by the owner, to be paid on the delivery of his property. His offer was to pay a "liberal reward." Who was to be the arbiter of the liberality of the offered reward? It cannot be supposed that the owner, by his offer, designed to constitute the recoverer of his property the exclusive judge of the amount to be paid him as a reward. And it is equally unreasonable and unjust, to say that the owner should be such exclusive judge. In the event of a difference between them, upon the subject, the amount to be paid must be ascertained by the judgment of the appropriate judicial tribunal. This would involve the delays incident to litigation, and it would be a gross perversion of the intention of the owner to infer, from his offered reward, an agreement on his part, that he was to be kept out of the possession of his property till all the delays of litigation were exhausted. To the bailee thus in possession of property, such a lien would rarely be valuable, except as a means of oppression and extortion; and, therefore, the law will never infer its existence either from the agreement of the parties, or in furtherance of public convenience or policy.

Judgment affirmed.

B. *Rights of Finder against Third Person.*

ARMORY v. DELAMIRIE.

NISI PRIUS, BEFORE PRATT, C. J. 1722.

[*Reported 1 Stra. 505.*]

THE plaintiff being a chimney sweeper's boy found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who under pretence of weighing it, took out the stones, and calling to the master to let him know it came to three halfpence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled.

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

2. That the action well lay against the master who gives a credit to his apprentice, and is answerable for his neglect. *Jones v. Hart*, Salk. 441; *Cor. Holt, C. J.*; *Mead v. Hamond*, 1 Stra. 505; *Grammar v. Nixon*, Ib. 653.

3. As to the value of the jewel, several of the trade were examined to prove what a jewel of the finest water that would fit the socket would

be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages; which they accordingly did.¹

BRIDGES v. HAWKESWORTH.

QUEEN'S BENCH. 1851.

[Reported 15 Jur. 1079.]

THIS was an appeal against a decision of the judge of the County Court of Westminster. The following facts appeared upon the case stated and signed by the judge: In October, 1847, the plaintiff, who was town traveller to Messrs. Rae & Co., called at Messrs. Byfield & Hawkesworth's on business, as he was in the habit of doing, and as he was leaving the shop he picked up a small parcel which was lying upon the floor. He immediately showed it to the shopman, and opened it in his presence, when it was found to consist of a quantity of Bank of England notes, to the amount of £65. The defendant, who was a partner in the firm of Byfield & Hawkesworth, was then called, and the plaintiff told him he had found the notes, and asked the defendant to keep them until the owner appeared to claim them. The defendant caused advertisements to be inserted in the Times newspaper, to the effect that bank notes had been found, and the owner might have them on giving a proper description and paying the expenses. No person having appeared to claim them, and three years having elapsed since they were found, the plaintiff applied to the defendant to have the notes returned to him, and offered to pay the expenses of the advertisements, and to give an indemnity. The defendant had refused to deliver them up to the plaintiff, and an action had been brought in the County Court of Westminster in consequence of that refusal. The case also found that the plaintiff, at the time he delivered over the notes to the defendant, did not intend to divest himself of any title that he might have to them. The judge had, upon these facts, decided that the defendant was entitled to the custody of the notes as against the plaintiff, and gave judgment in his favor accordingly. It was to review this decision that the present appeal had been brought.

Gray (*Heath* with him) for the appellant. The plaintiff, by finding the notes in question, acquired a title to them against the whole world, except the true owner. *Armory v. Delamirie*, 1 Str. 504; 1 Smith's L. C. 151 (6th ed.) 315. Having found them, he delivered them to the defendant for a special purpose only, and never intended to part with

¹ See *Brandon v. Planters' Bank*, 1 Stew. 320; *Williams v. Crum*, 27 Ala. 468; *Duncan v. Stear*, 11 Wend. 54; *Barwick v. Barwick*, 11 Ired. 80.

his property therein. The judge appears to have decided the case upon the ground that they were found in the house of another; but that makes no difference. If they had been found in the highway they would have been the property of the finder, except as against the true owner; and yet the highway is the private property of some one, subject to the right of the public to pass over it. Suppose they had been found in the yard of the defendant, then they could be lawfully retained as against him; he might have had an action of trespass for entering the yard, but not any action founded on the possession of the goods. How did the defendant acquire any property therein? The mere fact of the notes having been dropped on the floor of his shop did not give it to him. [PATTESON, J. If one enters a cab, and takes away a parcel left there by a former passenger, the property might be laid in the cab-owner in an indictment for the felony. WIGHTMAN, J. If the notes had been left on a chair, and the customer coming in had merely lifted them off, would they have become his property? They were not lost in the ordinary sense of the term, but were there *in conspectu omnium*. You say that any one taking possession of them, although they were in one sense in the possession of the shopkeeper, acquires a title to them, except as against the true owner.] Yes. Perhaps an indictment would lie for stealing the goods of a person unknown; but here the owner of the shop, not having taken possession, could not lay the property in himself. [PATTESON, J. Is there any instance of indicting a person for stealing the goods of a person unknown? If the owner be unknown, could felony be committed in respect of the goods? There might probably be an indictment for a robbery of a person unknown.] The man who first picked up the notes would be the finder, even although the owner of the shop should first see them. Puffendorf, lib. 4, c. 6, § 8, shows that the bare seeing, or the knowing where lost goods are, is not sufficient. [WIGHTMAN, J. You must go further, and show that their being in the shop of the defendant makes no difference. Blackstone says, that whatever movables are found on the face of the earth belong to the first occupier.] That would be so where no owner appears; it would be the same, as between the finder and the rest of the world, as if there were no owner. Blackstone (1 Com. 296), speaking of treasure trove, says, "Such as is casually lost or unclaimed still remains the right of the fortunate finder." That was an express authority for the general rule; and if the other side contended that the notes being found in a man's house made any difference, it lay upon them to establish that proposition. [PATTESON, J. In Puffendorf, lib. 4, c. 6, § 13, it is said, "He who hath hidden treasure in another's ground, without acquainting the lord of the soil, is judged to have slipped his opportunity; . . . but if the ground belongs to another, then the finder seems engaged by his conscience to inquire, at least indirectly, of him concerning the matter, because, without this, it cannot certainly be known but that the money was laid there by the master of the place only for the greater security, or by some person else with his

privity and consent." From which it would appear, that if it were laid there without the consent or privity of the owner of the soil, he would not be entitled to it. These notes were certainly not intrusted to the defendant — they were lost.] By the law of nature, a finder acquires property by taking possession of the goods found, and those cases in which the property is given to the State or to particular individuals are exceptions upon the law of nature. In *Reg. v. Kerr*, 8 Car. & P. 176, it was held, "that a servant who had found some bank notes in her master's house ought to have inquired of him whether they were his or not." Those were her master's notes, which brought the facts within the rule laid down by Puffendorf where the owner of property is known. It therefore does not apply to this case. But if the other side were right, the servant would be equally guilty of felony whether they were her master's notes or not. They must put it upon the ground of a special property in the owner of the house; and if so, the servant would be guilty of felony whether she made inquiry as to the true owner or not; but a finder is not guilty of larceny where he has no reasonable opportunity of knowing the owner, because the articles found belong to him, whatever may be his intention at the time of taking them. [PATTESON, J. If goods were found in an inn, it would be different. There a special property is vested in the innkeeper by reason of his liability. In *Merry v. Green*, 7 M. & W. 623, it was held, that there might be property in a person of goods, although he did not know of its existence. There a bureau was bought at an auction, and a purse of money was found in a secret drawer therein; and it was held that it belonged to the seller, although he knew nothing of it. That and *Cartwright v. Green*, 8 Ves. 405, appear to be the nearest to the present case.] In *Merry v. Green*, the money was not lost — it was entirely inclosed in a chattel belonging to the seller; here the loss and the finding are stated in the case. The defendant, to have any right, must have indicated his intention to take possession before the other did. If the shopkeeper had placed it on one side until he found the owner, it would have been different; but here the plaintiff is the finder. As to the notes being found in the shop, that reduces it merely to a question of degree; a shop is more private than a field, a field more private than a highway; but the fact of the articles found being upon the soil of another does not prevent them from becoming the property of the finder. The defendant had not made himself liable to the true owner. *Isaack v. Clark*, 2 Bulst. 312, shows "that when a man doth find goods, he is bound to answer him that hath the property." The defendant received the notes only for the purpose of advertising them, and restoring them to the true owner, if he should appear. [He also cited *Sutton v. Moody*, 1 Ld. Raym. 250.]

Heath offered to address the court on the same side, but it was decided that only one counsel could be heard on each side.

Hake, for the respondent. The plaintiff could not acquire property in these notes by merely picking them up; and if he could he had in

this case divested himself of that property by handing them over to the defendant, thereby making him the principal in the matter, and investing him with the responsibility of a finder. The notes, if they were in truth the property of a customer, came into the shop by leave of the owner of the shop. Dig. lib. 41, De Acq. Re. Dom., tit. 1. [PATTESON, J. That assumes that they are deposited intentionally; in which case there can be no doubt whatever.] Savigny, in his celebrated Treatise on the Law of Possession (translated by Sir Edward Perry), § 18, states that the principle of the rule is easily to be discovered. The maxim is, "*Vacua est quam nemo detinet.*" Here the *jus detentionis* was in the defendant, and there was no vacancy of possession. If the goods had been of larger bulk, the owner of the house might have distrained them damage feasant, and no one could have taken them from his custody. If a scintilla of dominion might be exercised by the shopkeeper, they could not vest in the finder. [PATTESON, J. Savigny speaks of money buried in the land; but how is it if it be in my house? The expression "If I know where it is, I possess it, without the act of taking it from its place of concealment" (p. 163, note e), seems to make the question of property turn upon a mere chance.] That doubt is answered by the case of *Merry v. Green*. In many instances property is held to belong to the owner of the soil, though he does not know of it, as in the case in Lord Raymond. In *Toplady v. Stalye*, Sty. 165, Rolle, C. J., says, "If cattle be stolen, and put into my ground, I may take them damage feasant." If the owner could not take them away, how could a stranger do so? *Anon.*, 1 Bulst. 96. In the Year Book, 12 Hen. 8, 9, it is said, "that the owner of a forest is the owner of the wild creatures therein *ratione loci*." In *Reg. v. Kerr*, Parke, B., asks, "What if I drop a ring, is my servant to take it away?" Suppose my guest loses his ring, is the servant finding it at liberty to keep it? Has not the owner of the house a right to take it from him? [WIGHTMAN, J. In that case there would be no question about the property.] If, in *Armory v. Delamirie*, the sweep had been employed to sweep a chimney, and, having entered a house for that purpose, had picked up a jewel therein, he could not have claimed it. In the case of a wreck, the lord, before seizure, has a constructive possession. In *Smith v. Milles*, 1 T. R. 480, Ashurst, J., says, "The right is in the lord, and a constructive possession, in respect of the thing being within the manor of which he is lord." [PATTESON, J. That is a manorial right, and does not apply to any other person. WIGHTMAN, J. In the preface to Savigny a difficulty is suggested in the passage quoted from Mr. Bentham: "A street porter enters an inn, puts down his bundle upon the table, and goes out; one person puts his hand upon the bundle to examine it, another puts his to carry it away, saying, 'It is mine.' The innkeeper runs to claim it, in opposition to them both. The porter returns, or does not return. Of these four men, who is in possession of the bundle?"] In that case the innkeeper has the property *ratione loci et impotentiae*. The parcel cannot fly away. In *Isaack v. Clark*,

Lord Coke says the finder has it in his election to take the goods or not into his custody. Did the plaintiff take to himself the charge of these notes, or make himself liable for the advertisements. [WIGHTMAN, J. If the plaintiff had merely showed them to the defendant, and said he would keep them, could the defendant have sued him for them?] Yes; by reason of their being found in the house he had a constructive possession, and also something less than a possession, — a *jus detentionis*. *Burn v. Morris*, 4 Tyr. 485, shows that the defendant was responsible to the true owner. In the *Case of Swans*, 7 Rep. 17 b, Lord Coke says that a possessory right is obtained in wild animals *ratione loci et impotentia* — that is, so long as they do not or cannot fly away. The reason of these decisions is given by Savigny (p. 163), — “A movable becomes connected with an immovable without, nevertheless, being incorporated with it.” *Semayne's Case*, 5 Rep. 93, shows that a house protects all goods lawfully there; and it is to be inferred that it displaces all right in a finder. The maxim of the civil law is, *Si in meam potestatem pervenit, meus factus sit*. Savigny (p. 169) comments upon it — “Possession of a thing may be acquired simply by the fact of its having been delivered at one's own residence, even though we are absent from the house at the time.” [WIGHTMAN, J. There they were directed to the house: here, if the finder had put the notes into his own pocket, the owner of the shop would not have known of them. If you can put any case where the goods came into the house without the knowledge of the owner of the house, it would be in point. PATTESON, J. If property is intentionally in my house, it is certainly in my possession.] There is a distinction between property obvious on the surface of the soil and what is buried. In the former case it is supposed that it will be seen by the owner or his servants; but if it is buried, the next owner is as likely to find it as the former one (Savigny, 169). The passages in Blackstone cited on the other side put the question upon the intention of the true owner to come back and claim the goods. By our old law goods found were to be delivered to justices; and in Deut. c. 22, we read, “Goods found should be kept near where they are lost.” In *Reg. v. Thurborn*, 2 Car. & K. 831, it was held, that to prevent the taking of goods from being larceny, it is essential that they should be taken in such a place and under such circumstances as that the owner would be reasonably presumed to have abandoned them. In 5 Rep. 109 a, it is said, “If one steal my goods and throw them into the house of another, they are not waifs.” So in Com. Dig., “Waif.” This case is undistinguishable from one where goods are left at an inn, and the relation of landlord and guest has ceased; if the goods are then stolen, the innkeeper is not liable. The act of taking possession of the notes by the plaintiff did not render him chargeable to the true owner, nor confer a property upon him. Dig., lib. 41, tit. 1, De Acq. Re. Dom.; *May v. Harvey*, 13 East, 197. If no engagement be exacted to redeliver, the party delivering cannot sue while the trust remains open. The defendant

may set up a *jus tertii*; he is liable to the true owner, and ought not to be liable to two in respect of one interest. He advertised that the notes could be had at his shop, and incurred liability for the advertisements. [He also cited *Ogle v. Atkinson*, 5 Taunt. 759, and *Templeman v. Case*, 10 Mod. 24.]

Gray, in reply, cited Savigny, 170 — "Every case of possession is founded on the state of consciousness of unlimited physical power."

Cur. adv. vult.

PATTESON, J., now delivered the following judgment: The notes which are the subject of this action were incidentally dropped, by mere accident, in the shop of the defendant, by the owner of them. The facts do not warrant the supposition that they had been deposited there intentionally, nor has the case been put at all upon that ground. The plaintiff found them on the floor, they being manifestly lost by some one. The general right of the finder to any article which has been lost, as against all the world, except the true owner, was established in the case of *Armory v. Delamirie*, which has never been disputed. This right would clearly have accrued to the plaintiff had the notes been picked up by him outside the shop of the defendant; and if he once had the right, the case finds that he did not intend, by delivering the notes to the defendant, to waive the title (if any) which he had to them, but they were handed to the defendant merely for the purpose of delivering them to the owner, should he appear. Nothing that was done afterwards has altered the state of things; the advertisements inserted in the newspaper, referring to the defendant, had the same object; the plaintiff has tendered the expense of those advertisements to the defendant, and offered him an indemnity against any claim to be made by the real owner, and has demanded the notes. The case, therefore, resolves itself into the single point on which it appears that the learned judge decided it, namely, whether the circumstance of the notes being found inside the defendant's shop gives him, the defendant, the right to have them as against the plaintiff, who found them. There is no authority in our law to be found directly in point. Perhaps the nearest case is that of *Merry v. Green*, but it differs in many respects from the present. We were referred, in the course of the argument, to the learned works of Von Savigny, edited by Chief Justice Perry; but even this work, full as it is of subtle distinctions and nice reasonings, does not afford a solution of the present question. It was well asked, on the argument, if the defendant has the right, *when* did it accrue to him? If at all, it must have been antecedent to the finding by the plaintiff, for that finding could not give the defendant any right. If the notes had been accidentally kicked into the street, and there found by some one passing by, could it be contended that the defendant was entitled to them from the mere fact of their being originally dropped in his shop? If the discovery had never been communicated to the defendant, could the real owner have had any cause of action against him

because they were found in his house? Certainly not. The notes never were in the custody of the defendant, nor within the protection of his house, before they were found, as they would have been had they been intentionally deposited there; and the defendant has come under no responsibility, except from the communication made to him by the plaintiff, the finder, and the steps taken by way of advertisement. These steps were really taken by the defendant as the agent of the plaintiff, and he has been offered an indemnity, the sufficiency of which is not disputed. We find, therefore, no circumstances in this case to take it out of the general rule of law, that the finder of a lost article is entitled to it as against all persons except the real owner, and we think that that rule must prevail, and that the learned judge was mistaken in holding that the place in which they were found makes any legal difference. Our judgment, therefore, is, that the plaintiff is entitled to these notes as against the defendant; that the judgment of the court below must be reversed, and judgment given for the plaintiff for £50. Plaintiff to have the costs of appeal. *Judgment accordingly.*¹

BARKER v. BATES.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1832.

[Reported 13 Pick. 255.]

TRESPASS. The plaintiff declared in his first count that the defendants broke and entered his close, and that being so entered, they took and carried away a stick of timber there found. The second count was for taking and carrying away the stick of timber.

At the trial, before *Shaw*, C. J., it appeared that the plaintiff was the owner of a farm in the town of Scituate, within the limits of the old colony of Plymouth, bounded easterly by the sea, which farm included two pieces of land conveyed to the United States as hereafter mentioned, and that at the time of the commission of the supposed trespass, he remained the owner of all of the farm, excepting the parts so conveyed.

In 1811 an act was passed by the Legislature of Massachusetts (St. 1810, c. 54) providing that the United States might purchase or take any tracts of land, not exceeding six acres, which should be necessary for the lighthouse authorized to be erected at the entrance of the harbor of Scituate, reserving to this Commonwealth exclusive jurisdiction over the land, except so far as might be necessary to enable the United States to carry their object into effect.

In pursuance of this act certain commissioners appraised and set off to the United States the two parcels of land above mentioned. The

¹ See *Bowen v. Sullivan*, 62 Ind. 281, the head-note of which is inaccurate.

boundaries of the first parcel were described as beginning at a stake and stones, and, after various courses, running northeasterly "to the cliff, thence by the cliff to the first-mentioned stake and stones." Below the cliff was a beach. A plan of the farm and of the two parcels set off to the United States, was used in the case.

It appeared that the stick of timber in question was discovered by the defendants on the rocks, at low-water mark, below the easterly side of the parcel of land above described, that it was then marked by one of the defendants with his name, and that the defendants subsequently attempted to carry away the stick from this place, but were prevented by the roughness of the sea. The stick was afterwards thrown upon the beach, below and adjoining the plaintiff's land, and on the easterly side thereof, and the defendants took and carried it away from the place last mentioned, and converted it to their own use.

If upon the facts in the case the court should be of opinion that the plaintiff was entitled to recover, the defendants were to be defaulted, and judgment to be rendered against them for the sum of fifteen dollars damages; otherwise a new trial was to be granted.

W. Baylies and Warren, for the defendants.

Eddy and Beal, for the plaintiff.

SHAW, C. J., delivered the opinion of the court. The sole and single question in the present case is, which of these parties has the preferable claim, by mere naked possession, without other title, to a stick of timber, driven ashore under such circumstances as lead to a belief that it was thrown overboard or washed out of some vessel in distress, and never reclaimed by the owner. It does not involve any question of the right of the original owner to regain his property in the timber, with or without salvage, or the right of the sovereign to claim title to property as wreck, or of the power and jurisdiction of the governments, either of the Commonwealth or of the United States, to pass such laws and adopt such regulations on the subject of wreck, as justice and public policy may require.

In considering this question of the relative right of possession, a preliminary one has been discussed, which is, whether the plaintiff had title to the land upon which the stick of timber was found. This place appears to have been on the seashore, between high and low water mark, in the town of Scituate, a town within the limits of the old colony of Plymouth. [The court then considered the question of the title to the *locus*, and resolved that it was the freehold of the plaintiff. The discussion of this question in the opinion is omitted. — Ed.]

Considering it as thus established, that the place upon which this timber was thrown up and had lodged was the soil and freehold of the plaintiff, that the defendants cannot justify their entry, for the purpose of taking away or marking the timber, we are of opinion that such entry was a trespass, and that as between the plaintiff and the defendants, neither of whom had or claimed any title except by mere possession, the plaintiff had, in virtue of his title to the soil, the preferable right of

possession, and therefore that the plaintiff has a right to recover the agreed value of the timber in his claim of damages.¹

CLARK v. MALONEY.

NISI PRIUS IN DELAWARE. 1840.

[Reported 3 Harrington, 68.]

ACTION of trover to recover the value of ten white pine logs. The logs in question were found by the plaintiff floating in the Delaware Bay after a great freshet, were taken up and moored with ropes in the mouth of Mispillion creek. They were afterwards in the possession of defendants, who refused to give them up, alleging that they had found them adrift and floating up the creek.

BAYARD, Chief Justice, charged the jury. The plaintiff must show first, that the logs were his property; and secondly, that they were converted by the defendants to their own use. In support of his right of property, the plaintiff relies upon the fact of his possession of the logs. They were taken up by him, adrift in the Delaware Bay, and secured by a stake at the mouth of Mispillion creek. Possession is certainly *prima facie* evidence of property. It is called *prima facie* evidence because it may be rebutted by evidence of better title, but in the absence of better title it is as effective a support of title as the most conclusive evidence could be. It is for this reason, that the finder of a chattel, though he does not acquire an absolute property in it, yet has such a property, as will enable him to keep it against all but the rightful owner. The defence consists, not in showing that the defendants are the rightful owners, or claim under the rightful owner; but that the logs were found by them adrift in Mispillion creek, having been loosened from their fastening either by accident or design, and they insist that their title is as good as that of the plaintiff. But it is a well settled rule of law that the loss of a chattel does not change the right of property; and for the same reason that the original loss of these logs by the rightful owner, did not change his absolute property in them, but he might have maintained trover against the plaintiff upon refusal to deliver them, so the subsequent loss did not divest the *special* property of the plaintiff. It follows, therefore, that as the plaintiff has shown a special property in these logs, which he never abandoned, and which enabled him to keep them against all the world but the rightful owner, he is entitled to a verdict.

*Verdict for the plaintiff.*²

Ridgely and Bates, for plaintiff.

Houston and Booth, for defendants.

¹ As to rights of a finder of an aerolite, see *Goddard v. Winchell*, 86 Iowa, 71.

² See *Deaderick v. Oulds*, 86 Tenn. 14.

M'AVOY v. MEDINA.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1866.

[Reported 11 Allen, 548.]

TORT to recover a sum of money found by the plaintiff in the shop of the defendant.

At the trial in the Superior Court, before *Morton, J.*, it appeared that the defendant was a barber, and the plaintiff, being a customer in the defendant's shop, saw and took up a pocket-book which was lying upon a table there, and said, "See what I have found." The defendant came to the table and asked where he found it. The plaintiff laid it back in the same place and said, "I found it right there." The defendant then took it and counted the money, and the plaintiff told him to keep it, and if the owner should come to give it to him; and otherwise to advertise it: which the defendant promised to do. Subsequently the plaintiff made three demands for the money, and the defendant never claimed to hold the same till the last demand. It was agreed that the pocket-book was placed upon the table by a transient customer of the defendant and accidentally left there, and was first seen and taken up by the plaintiff, and that the owner had not been found.

The judge ruled that the plaintiff could not maintain his action, and a verdict was accordingly returned for the defendant; and the plaintiff alleged exceptions.

E. J. Sherman and *J. C. Sanborn*, for the plaintiff.

D. Saunders, Jr., for the defendant.

DEWEY, J. It seems to be the settled law that the finder of lost property has a valid claim to the same against all the world except the true owner, and generally that the place in which it is found creates no exception to this rule. 2 Parsons on Con. 97; *Bridges v. Hawkesworth*, 7 Eng. Law & Eq. R. 424.

But this property is not, under the circumstances, to be treated as lost property in that sense in which a finder has a valid claim to hold the same until called for by the true owner. This property was voluntarily placed upon a table in the defendant's shop by a customer of his who accidentally left the same there and has never called for it. The plaintiff also came there as a customer, and first saw the same and took it up from the table. The plaintiff did not by this acquire the right to take the property from the shop, but it was rather the duty of the defendant, when the fact became thus known to him, to use reasonable care for the safe keeping of the same until the owner should call for it. In the case of *Bridges v. Hawkesworth* the property, although found in a shop, was found on the floor of the same, and had not been placed there voluntarily by the owner, and the court held that the finder was entitled to the possession of the same, except as to the owner. But the present case more resembles that of *Lawrence v. The State*,

1 Humph. (Tenn.) 228, and is indeed very similar in its facts. The court there make a distinction between the case of property thus placed by the owner and neglected to be removed, and property lost. It was there held that "to place a pocket-book upon a table and to forget to take it away is not to lose it, in the sense in which the authorities referred to speak of lost property."

We accept this as the better rule, and especially as one better adapted to secure the rights of the true owner.

In view of the facts of this case, the plaintiff acquired no original right to the property, and the defendant's subsequent acts in receiving and holding the property in the manner he did does not create any.¹

Exceptions overruled.

DURFEE v. JONES.

SUPREME COURT OF RHODE ISLAND. 1877.

[*Reported 11 R. I. 588.*]

ASSUMPSIT, heard by the court, jury trial being waived.

DURFEE, C. J. The facts in this case are briefly these: In April, 1874, the plaintiff bought an old safe, and soon afterwards instructed his agent to sell it again. The agent offered to sell it to the defendant for ten dollars, but the defendant refused to buy it. The agent then left it with the defendant, who was a blacksmith, at his shop for sale for ten dollars, authorizing him to keep his books in it until it was sold or reclaimed. The safe was old-fashioned, of sheet-iron, about three feet square, having a few pigeon-holes and a place for books, and back of the place for books a large crack in the lining. The defendant shortly after the safe was left, upon examining it, found secreted between the sheet-iron exterior and the wooden lining a roll of bills amounting to \$165, of the denomination of the national bank bills which have been current for the last ten or twelve years. Neither the plaintiff nor the defendant knew the money was there before it was found. The owner of the money is still unknown. The defendant informed the plaintiff's agent that he had found it, and offered it to him for the plaintiff; but the agent declined it, stating that it did not belong to either himself or the plaintiff, and advised the defendant to deposit it where it would be drawing interest until the rightful owner appeared. The plaintiff was then out of the city. Upon his return, being informed of the finding, he immediately called on the defendant and asked for the money, but the defendant refused to give it to him. He then, after taking advice, demanded the return of the safe and its contents, precisely as they existed when placed in the defendant's hands. The defendant promptly

¹ See *Kincaid v. Eaton*, 98 Mass. 139, *accord*. And see *Livermore v. White*, 74 Me. 452.

gave up the safe, but retained the money. The plaintiff brings this action to recover it or its equivalent.

The plaintiff does not claim that he acquired, by purchasing the safe, any right to the money in the safe as against the owner; for he bought the safe alone, not the safe and its contents. See *Merry v. Green*, 7 M. & W. 623. But he claims that as between himself and the defendant his is the better right. The defendant, however, has the possession, and therefore it is for the plaintiff, in order to succeed in his action, to prove his better right.

The plaintiff claims that he is entitled to have the money by the right of prior possession. But the plaintiff never had any possession of the money, except, unwittingly, by having possession of the safe which contained it. Such possession, if possession it can be called, does not of itself confer a right. The case at bar is in this view like *Bridges v. Hawkesworth*, 15 Jur. 1079; 21 L. J. Q. B. 75, A. D. 1851; 7 Eng. L. & Eq. 424. In that case, the plaintiff, while in the defendant's shop on business, picked up from the floor a parcel containing bank notes. He gave them to the defendant for the owner if he could be found. The owner could not be found, and it was held that the plaintiff as finder was entitled to them, as against the defendant as owner of the shop in which they were found. "The notes," said the court, "never were in the custody of the defendant nor within the protection of his house, before they were found, as they would have been if they had been intentionally deposited there." The same in effect may be said of the notes in the case at bar; for though they were originally deposited in the safe by design, they were not so deposited in the safe, after it became the plaintiff's safe, so as to be in the protection of the safe as *his* safe, or so as to affect him with any responsibility for them. The case at bar is also in this respect like *Tatum v. Sharpless*, 6 Phila. 18. There it was held, that a conductor who had found money which had been lost in a railroad car was entitled to it as against the railroad company.

The plaintiff also claims that the money was not lost, but designedly left where it was found, and that therefore as owner of the safe he is entitled to its custody. He refers to cases in which it has been held, that money or other property voluntarily laid down and forgotten is not in legal contemplation lost, and that of such money or property the owner of the shop or place where it is left is the proper custodian rather than the person who happens to discover it first. *State v. McCann*, 19 Mo. 249; *Lawrence v. The State*, 1 Humph. 228; *McAvoy v. McDina*, 11 Allen, 549. It may be questioned whether this distinction has not been pushed to an extreme. See *Kincaid v. Eaton*, 98 Mass. 139. But however that may be, we think the money here, though designedly left in the safe, was probably not designedly put in the crevice or interspace where it was found, but that, being left in the safe, it probably slipped or was accidentally shoved into the place where it was found without the knowledge of the owner, and so was lost, in the stricter sense of the word. The money was not simply deposited and forgotten,

but deposited and lost by reason of a defect or insecurity in the place of deposit.

The plaintiff claims that the finding was a wrongful act on the part of the defendant, and that therefore he is entitled to recover the money or to have it replaced. We do not so regard it. The safe was left with the defendant for sale. As seller he would properly examine it under an implied permission to do so, to qualify him the better to act as seller. Also under the permission to use it for his books, he would have the right to inspect it to see if it was a fit depository. And finally, as a possible purchaser he might examine it, for though he had once declined to purchase, he might on closer examination change his mind. And the defendant, having found in the safe something which did not belong there, might, we think, properly remove it. He certainly would not be expected either to sell the safe to another, or to buy it himself without first removing it. It is not pretended that he used any violence or did any harm to the safe. And it is evident that the idea that any trespass or tort had been committed did not even occur to the plaintiff's agent when he was first informed of the finding.

The general rule undoubtedly is, that the finder of lost property is entitled to it as against all the world except the real owner, and that ordinarily the place where it is found does not make any difference. We cannot find anything in the circumstances of the case at bar to take it out of this rule.

We give the defendant judgment for costs.

A. J. Cushing, for plaintiff.

Francis W. Minor, for defendant.¹

HAMAKER v. BLANCHARD.

SUPREME COURT OF PENNSYLVANIA. 1879.

[Reported 90 Pa. 377.]

BEFORE SHARSWOOD, C. J., MERCUR, GORDON, PAXSON, WOODWARD, TRUNKEY, and STERRETT, JJ.

Error to the Court of Common Pleas of Mifflin County: Of May Term, 1879, No. 57.

Assumpsit by James Blanchard and Sophia, his wife, for the use of the wife, against W. W. Hamaker.

This was an appeal from the judgment of a justice of the peace. The material facts were these: Sophia Blanchard was a domestic servant in a hotel in Lewistown, of which the defendant was the proprietor. While thus employed, she found in the public parlor of the hotel, three

¹ See *Elwes v. Brigg Gas Co.*, 33 Ch. D. 562; *Huthmacher v. Harris*, 38 Pa. 491; *Keron v. Cashman*, 33 Atl. R. 1055; 19 N. J. L. J. 54.

twenty-dollar bills. On finding the money, she went with it to Mr. Hamaker, and informed him of the fact, and upon his remarking that he thought it belonged to a whip-agent, a transient guest of the hotel, she gave it to him, for the purpose of returning it to said agent. It was afterwards ascertained that the money did not belong to the agent, and no claim was made for it by any one. Sophia afterwards demanded the money of defendant, who refused to deliver it to her. Defendant admitted that he still had the custody of the money.

In the general charge the court (BUCHER, P. J.), *inter alia*, said: "If you find that this was lost money, Hamaker did not lose it, and that it never belonged to him, but that it belonged to some one else who has not appeared to claim it, then you ought to find for the plaintiff, on the principle that the finder of a lost chattel is entitled to the possession and use of it as against all the world except the true owner. . . . The counsel for the defendant asks us to say that as the defendant was the proprietor of a hotel and the money was found therein, the presumption of law is that it belonged to a guest, who had lost it, and that the defendant has a right to retain it as against this woman, the finder, to await the demand of the true owner. I decline to give you such instructions; but charge you that under the circumstances there is no presumption of law that this money was lost by a guest at the hotel, and that the defendant is entitled to keep it as against this woman for the true owner."

The verdict was for the plaintiffs for \$60, with interest, and after judgment thereon, defendant took this writ and assigned for error the foregoing portions of the charge.

H. J. Culbertson, for plaintiffs in error.

J. A. McKee, for defendant in error.

Mr. Justice TRUNKY delivered the opinion of the court.

It seems to be settled law that the finder of lost property has a valid claim to the same against all the world, except the true owner, and generally that the place in which it is found creates no exception to this rule. But property is not lost, in the sense of the rule, if it was intentionally laid on a table, counter, or other place, by the owner, who forgot to take it away, and in such case the proprietor of the premises is entitled to retain the custody. Whenever the surroundings evidence that the article was deposited in its place, the finder has no right of possession against the owner of the building. *McAvoy v. Medina*, 11 Allen (Mass.), 548. An article casually dropped is within the rule. Where one went into a shop, and as he was leaving picked up a parcel of bank notes, which was lying on the floor, and immediately showed them to the shopman, it was held that the facts did not warrant the supposition that the notes had been deposited there intentionally, they being manifestly lost by some one, and there was no circumstance in the case to take it out of the general rule of law, that the finder of a lost article is entitled to it as against all persons, except the real owner. *Bridges v. Hawkesworth*.

The decision in *Mathews v. Harsell*, 1 E. D. Smith (N. Y.), 393, is not in conflict with the principle, nor is it an exception. Mrs. Mathews, a domestic in the house of Mrs. Barmore, found some Texas notes, which she handed to her mistress, to keep for her. Mrs. Barmore afterwards intrusted the notes to Harsell, for the purpose of ascertaining their value, informing him that she was acting for her servant, for whom she held the notes. Harsell sold them, and appropriated the proceeds; whereupon Mrs. Mathews sued him and recovered their value, with interest from date of sale. Such is that case. True, Woodruff, J., says: "I am by no means prepared to hold that a house-servant, who finds lost jewels, money, or chattels, in the house of his or her employer, acquires any title even to retain possession against the will of the employer. It will tend much more to promote honesty and justice to require servants in such cases to deliver the property so found to the employer, for the benefit of the true owner." To that remark, foreign to the case as understood by himself, he added the antidote: "And yet the court of Queen's Bench in England, have recently decided that the place in which a lost article is found, does not form the ground of any exception to the general rule of law, that the finder is entitled to it against all persons, except the owner." His views of what will promote honesty and justice are entitled to respect, yet many may think Mrs. Barmore's method of treating servants far superior.

The assignments of error are to so much of the charge as instructed the jury that, if they found the money in question was lost, the defendant had no right to retain it because found in his hotel, the circumstances raising no presumption that it was lost by a guest, and their verdict ought to be for the plaintiff. That the money was not voluntarily placed where it was found, but accidentally lost, is settled by the verdict. It is admitted that it was found in the parlor, a public place open to all. There is nothing to indicate whether it was lost by a guest, or a boarder, or one who had called with or without business. The pretence that it was the property of a guest, to whom the defendant would be liable, is not founded on an act or circumstance in evidence.

Many authorities were cited, in argument, touching the rights, duties, and responsibilities of an innkeeper in relation to his guests; these are so well settled as to be uncontroverted. In respect to other persons than guests, an innkeeper is as another man. When money is found in his house, on the floor of a room common to all classes of persons, no presumption of ownership arises; the case is like the finding upon the floor of a shop. The research of counsel failed to discover authority that an innkeeper shall have an article which another finds in a public room of his house, where there is no circumstance pointing to its loss by a guest. In such case the general rule should prevail. If the finder be an honest woman, who immediately informs her employer, and gives him the article on his false pretence that he knows the owner and

will restore it, she is entitled to have it back and hold it till the owner comes. A rule of law ought to apply to all alike. Persons employed in inns will be encouraged to fidelity by protecting them in equality of rights with others. The learned judge was right in his instructions to the jury.

*Judgment affirmed.*¹

MERCUR, J., dissents.

SOUTH STAFFORDSHIRE WATER CO. v. SHARMAN.

QUEEN'S BENCH DIVISION, 1896.

[Reported L. R. 2 Q. B. D. 44.]

APPEAL from the decision of the county court of Staffordshire holden at Lichfield.

Under a conveyance dated January 6, 1872, from the mayor, aldermen, and citizens of the city of Lichfield, the plaintiffs were the owners in fee simple in possession of the land covered by the Minster Pool in that city.

In August, 1895, the plaintiffs employed the defendant, together with a number of other workmen, to clean out the pool. During the operation several articles of interest were found, and the defendant, while so employed, found in the mud at the bottom of the pool two gold rings. The plaintiffs demanded the rings, but he refused to deliver them up, and placed them in the hands of the police authorities, who, by advertisement and otherwise, endeavored to find the owner of the rings. Ultimately, being unsuccessful in finding the real owner, the police authorities returned the rings to the defendant.

The plaintiffs then sued the defendant in detinue for the recovery of the rings.

It was proved at the trial that there was no special contract between the plaintiffs and the defendant as to giving up any articles that might be found.

The county court judge gave judgment for the defendant, holding, on the authority of *Armory v. Delamirie*, 1 Str. 505, and *Bridges v. Hawkesworth*, 21 L. J. (Q. B.) 75, that the defendant had a good title against all the world except the real owner.

The plaintiffs appealed.

William Wills, for the plaintiffs. The county court judge was wrong. *Armory v. Delamirie*, 1 Str. 505, is no authority in this case. The decision there was only that the finder of an article may maintain an action of trover for conversion of the article by a wrongdoer. *Bridges v. Hawkesworth*, 21 L. J. (Q. B.) 75, turned on very special facts: there the articles were found in the public part of a shop,

¹ See *Tatum v. Sharpless*, accord., 6 Phil. 18 (1865); *Ellery v. Cunningham*, 1 Met. 112.

and it was held that they were not the property of the shopkeeper, but of the finder, because they never were within the protection of the house. But where an article is found on private property it is in the possession of the owner of that property, although he may be unaware of its existence: *Templeman v. Case*, 10 Mod. 24; *Reg. v. Rowe*, Bell C. C. 93; 28 L. J. (M. C.) 128; *Elwes v. Brigg Gas Co.*, 33 Ch. D. 562.

[He was stopped.]

Disturnal, for the defendant. The county court judge was right. The onus is on the plaintiffs to establish their title to the rings. Of course, if they can prove a *de facto* possession they are entitled to them. Blackstone says that if a man scatter his treasure into the sea or upon the surface of the earth there is such a dereliction of it that it is the property of the first finder. The mere ownership of land does not create presumptive possession in respect of all chattels found on the land. [He cited *Reg. v. Clinton*, Ir. Rep. 4 C. L. 6; *Brew v. Haren*, Ir. Rep. 11 C. L. 198.]

LORD RUSSELL OF KILLOWEN, C. J. In my opinion, the county court judge was wrong, and his decision must be reversed and judgment entered for the plaintiffs. The case raises an interesting question. The action was brought in detinue to recover the possession of two gold rings from the defendant. The defendant did not deny that he had possession of the rings, but he denied the plaintiffs' title to recover them from him. Under those circumstances the burden of proof is cast upon the plaintiffs to make out that they have, as against the defendant, the right to the possession of the rings.

Now, the plaintiffs, under a conveyance from the corporation of Lichfield, are the owners in fee simple of some land on which is situate a pool known as the Minster Pool. For purposes of their own the plaintiffs employed the defendant, among others, to clean out that pool. In the course of that operation several articles of interest were found, and amongst others the two gold rings in question were found by the defendant in the mud at the bottom of the pool.

The plaintiffs are the freeholders of the *locus in quo*, and as such they have the right to forbid anybody coming on their land or in any way interfering with it. They had the right to say that their pool should be cleaned out in any way that they thought fit, and to direct what should be done with anything found in the pool in the course of such cleaning out. It is no doubt right, as the counsel for the defendant contended, to say that the plaintiffs must show that they had actual control over the *locus in quo* and the things in it; but under the circumstances, can it be said that the Minster Pool and whatever might be in that pool were not under the control of the plaintiffs? In my opinion, they were. The case is like the case, of which several illustrations were put in the course of the argument, where an article is found on private property, although the owners of that property are ignorant that it is there. The principle on which this case must be decided, and the distinction which must be drawn between this case

and that of *Bridges v. Hawkesworth*, 21 L. J. (Q. B.) 75, is to be found in a passage in Pollock and Wright's Essay on Possession in the Common Law, p. 41: "The possession of land carries with it in general, by our law, possession of everything which is attached to or under that land, and, in the absence of a better title elsewhere, the right to possess it also. And it makes no difference that the possessor is not aware of the thing's existence. . . . It is free to any one who requires a specific intention as part of a *de facto* possession to treat this as a positive rule of law. But it seems preferable to say that the legal possession rests on a real *de facto* possession constituted by the occupier's general power and intent to exclude unauthorized interference."

That is the ground on which I prefer to base my judgment. There is a broad distinction between this case and those cited from Blackstone. Those were cases in which a thing was cast into a public place or into the sea — into a place, in fact, of which it could not be said that any one had a real *de facto* possession, or a general power and intent to exclude unauthorized interference.

The case of *Bridges v. Hawkesworth*, 21 L. J. (Q. B.) 75, stands by itself, and on special grounds; and on those grounds it seems to me that the decision in that case was right. Some one had accidentally dropped a bundle of bank notes in a public shop. The shopkeeper did not know they had been dropped, and did not in any sense exercise control over them. The shop was open to the public, and they were invited to come there. A customer picked up the notes and gave them to the shopkeeper in order that he might advertise them. The owner of the notes was not found, and the finder then sought to recover them from the shopkeeper. It was held that he was entitled to do so, the ground of the decision being, as was pointed out by Patteson, J., that the notes, being dropped in the public part of the shop, were never in the custody of the shopkeeper, or "within the protection of his house."

It is somewhat strange that there is no more direct authority on the question; but the general principle seems to me to be that where a person has possession of house or land, with a manifest intention to exercise control over it and the things which may be upon or in it, then, if something is found on that land, whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the *locus in quo*.

WILLS, J. I entirely agree; and I will only add that a contrary decision would, as I think, be a great and most unwise encouragement to dishonesty. *Appeal allowed; judgment for plaintiffs.*¹

¹ See *Regina v. Rowe*, Bell, C. C. 93; *Ferguson v. Ray*, 44 O. P. 557.

NOTE. The rights and duties of finders of property are sometimes defined by statute. *E. g.*, Mass. P. S. cc. 94, 95; 2 Ill. An. Sts., Starr & Curtis, c. 50, §§ 27-29.

BOOK III.

INTRODUCTION TO THE LAW OF REAL PROPERTY.

CHAPTER I.

TENURE.

SECTION I.

TENURE IN GENERAL.

Co. Lit. 65 a. For the better understanding of that which shall be said hereafter, it is to be knowne, that first, there is no land in England in the hands of any subject (as it hath been said) but it is holden of some lord by some kind of service, as partly hath been touched before.¹

2 BL. Com. 59, 60. Thus all the land in the kingdom is supposed to be holden, mediately or immediately, of the king, who is styled the lord paramount, or above all. Such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king; and, thus partaking of a middle nature, were called *mesne*, or middle, lords. So that if the king granted a manor to A., and he granted a portion of the land to B., now B. was said to hold of A., and A. of the king; or, in other words, B. held his lands immediately of A., but mediately of the king. The king therefore was styled lord paramount; A. was both tenant and lord, or was a mesne lord: and B. was called tenant *paravail*, or the lowest tenant; being he who was supposed to make avail, or profit of the land. 1 Inst. 296.

¹ "According to this position, of which the truth is undeniable, all the lands in England, except those in the king's hands, are feudal. This universality of tenures, if not quite peculiar to England, certainly doth not prevail in several countries on the continent of Europe, where the feudal system has been established; and it seems there are some few portions of allodial land in the northern part of our own island." — Hargrave's note *ad loc.*

See Digby, Law Real Prop. c. 1, sect. 2, § 1.

All tenures being thus derived, or supposed to be derived, from the king, those that held immediately under him, in right of his crown and dignity, were called his tenants *in capite*, or in chief; which was the most honorable species of tenure, but at the same time subjected the tenants to greater and more burthensome services, than inferior tenures did.

ST. 18 EDW. I. C. 1 ; ST. OF WESTM. III. ; ST. QUIA EMPTORES (1290). Forasmuch as purchasers of lands and tenements of the fees of great men and other lords have many times heretofore entered into their fees, to the prejudice of the lords, to whom the freeholders of such great men have sold their lands and tenements to be holden in fee of their feoffors and not of the chief lords of the fees, whereby the same chief lords have many times lost their escheats, marriages, and wardships of lands and tenements belonging to their fees, which thing seems very hard and extreme unto those lords and other great men, and moreover in this case manifest disheritance, our lord the king in his parliament at Westminster after Easter the eighteenth year of his reign, that is to wit in the quinzine of Saint John Baptist, at the instance of the great men of the realm granted, provided, and ordained, that from henceforth it should be lawful to every freeman to sell at his own pleasure his lands and tenements or part of them, so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee, by such service and customs as his feoffor held before.

c. 2. And if he sell any part of such lands or tenements to any, the feoffee shall immediately hold it of the chief lord, and shall be forthwith charged with the services for so much as pertaineth or ought to pertain to the said chief lord, for the same parcel, according to the quantity of the land or tenement so sold; and so in this case the same part of the service shall remain to the lord; to be taken by the hands of the feoffee, for the which he ought to be attendant and answerable to the same chief lord according to the quantity of the land or tenement sold for the parcel of the service so due.

c. 3. And it is to be understood that by the said sales or purchases of lands or tenements, or any parcel of them, such lands or tenements shall in no wise come into mortmain, either in part or in whole, neither by policy ne craft, contrary to the form of the statute made thereupon of late. And it is to wit that this statute extendeth but only to lands holden in fee simple, and that it extendeth to the time coming. And it shall begin to take effect at the Feast of Saint Andrew the Apostle next coming.¹

¹ This statute did not exempt the tenants of the crown *in capite* from the necessity of procuring the king's license to alienate, because the king's rights, he not being specially named, are not affected by the statute. (Co. Lit. 43 b.) Therefore, (1) if the tenant *in capite* aliened without license, the crown could distrain for a fine upon the land (Fitzh. N. B. 175 A); and, (2) upon such unlicensed alienation, the services were not apportioned, but the crown could distrain upon any of the tenants for the

SECTION II.

MANORS.

Co. Cor. § 31. — The efficient cause of a manor is expressed in these words, *of long continuance*: for, indeed, time is the mother, or rather the nurse, of manors; time is the soul that giveth life unto every manor, without which a manor decayeth and dieth: for 'tis not the two material causes of a manor, but the efficient cause (knitting and uniting together those two material causes) that maketh a manor. Hence it is that the king himself cannot create a perfect manor at this day; for such things as receive their perfection by the continuance of time come not within the compass of a king's prerogative: and therefore the king cannot grant freehold to hold by copy, neither can the king create any new custom, nor do anything that amounteth to the creation of a new custom.

LEAKE, DIGEST OF LAND LAW, 19–22. — A grant of land from the Crown under the feudal system usually conferred rights of jurisdiction and other sovereign rights or franchises within the territory, by virtue of which it was constituted a *manor*. The larger manors, comprising inferior manors and lordships held of them by sub-infeudation, were, in early times, often called, with some slight distinctions of meaning, *honours* and *baronies*.

In regard to territory, a manor comprised the portions of the fee retained in possession by the lord himself, called the *demesne* lands,¹

whole services. (*Ibid.* 235 A.) The king's right to the fine seems to have been derived from *Mag. Cart.* cap. 32. (Co. Litt. 43 b.)

Blackstone seems to have thought that the statute did not extend to the tenants of the crown *in capite*, in the sense that they might subsequently create *de novo* a tenure in fee simple to be holden of themselves. (2 Bl. Com. 91.) But it is perhaps uncertain whether he adverted to the distinction between the different senses which the words "extend to" may bear. The statute has two aspects, one in so far as it enables the tenant to alienate, the other in so far as it disables him from creating *de novo* a tenure in fee simple to be held of himself. The statute did not enable the tenants *in capite* to alienate as against the crown; and in this sense it may be said that the statute did not "extend to" the tenants *in capite*, though it would be more strictly correct to say, that the statute did not extend to the crown. This proposition is, in fact, the import of the passages cited in the last preceding paragraph from Fitzherbert. But it does not follow that the statute did not extend to the tenants *in capite*, meaning thereby that it failed to restrain them from creating *de novo* a tenure in fee simple. The question seems to be at this day of no practical importance; for Blackstone held that in any case the effect of the statutes 17 Edw. 2, *De Prærogativa Regis*, c. 6, and 34 Edw. 3, c. 15, is to invalidate all sub-infeudations by the tenants *in capite* of later date than the commencement of the reign of Edward I. Challis, R. P. (2d ed.), 20.

See F. N. B. 211, I; 2 Inst. 67; Co. Litt. 98 b, 99 a. — ED.

¹ "Demesne, termed in latine *demanium*, *domanium*, or *dominicum*, is taken in a double sense, *propiè* and *impropiè*. *Propiè*, for that land which is in the king's own hands; and Chopimus saith, that *domanium est illud quod consecratum, unitum,*

terræ dominicales, and the portions granted in fee to tenants by sub-infeudation to hold of the manor by services, *terræ tenementales*, of which the lord retained the seignory and services. There might also be *waste* land, not as yet in occupation, used in common by the tenants of the manor for pasturage and like purposes; but the title remained in the lord, who might from time to time *approve* or appropriate the waste, subject to the rights exercised over it by his tenants.

In regard to jurisdiction, the manor comprised a court called the Court Baron or Lord's Court, having two distinct branches or courts. The superior or freehold branch of the court was constituted of the tenants holding fees of the manor, who were bound by their tenure to give *suit* or service at the court as judges; and their jurisdiction extended to pleas concerning the lands thus held of the manor.

The aggregate of these rights and incidents constituted a manor in the legal acceptation of the term; and accordingly a manor is described in law as consisting of demesne lands, and seignories and services anciently united thereto, together with the jurisdiction of a court baron; all of which elements are necessary to constitute a perfect manor.¹

et incorporatum est regiæ coronæ, — 'domain is that which is consecrated, united, and incorporated with the royal crown.' Take *domanium* in this sense, and then you exclude all common persons from being seised in *dominico*; for admit the king pass over the demesne lands, as soon as they come into a common person's hands *desinunt esse terræ dominicales*, — 'they cease to be domain lands;' for though the king's patentee hath the land granted to him and to his heirs, yet coming from the king, it must necessarily be holden of the king, but it is contrary to the nature of demesne lands to be holden of any. Therefore though those lands, which commonly are termed *ancient demesne*, viz., such lands as were formerly in the hands of Edward the Confessor, may properly be termed generally ancient demesne, because they were in ancient time in the king's own possession; yet to term them at this day the lord's demesnes, or the tenant's demesnes, being severed from the Crown, is improper.

"Then, by this it appeareth that those lands are termed *improperly* demesne which are in the hands of an inferior lord or tenant, nor can such a one in propriety of speech be said to stand seized of any land whatsoever *in dominico suo*, — 'in his demesne;' but if you observe narrowly the manner of pleadings, the words are used in a proper sense, for you shall never find that an inferior lord or tenant will plead that he is simply seised *in dominico*, but still with this addition, *in dominico suo ut de feodo*, — 'as a fee;' and that very aptly, for this word *fee* implieth thus much, that his estate is not absolute, but depending upon some superior lord. Therefore I conclude, with the Feudists, that a common person may aptly be said to stand seised *in feodo*, — 'in fee,' — or *in dominico suo ut de feodo*; but improperly *in dominico* simply. The king, *è converso*, may properly be said to stand seised *in dominico* simply; but *in feodo* improperly, or *in dominico suo ut de feodo*, — 'as in his demesne of fee.'" Co. Cop. §§ 11, 12.

See *A. G. v. Parsons*, 2 C. & J. 279. — Ed.

¹ Perkins, s. 670; Co. Lit. 68 a, b; Co. Cop. s. 31; Spelman, Gloss. "Manerium." As to the distinction of the demesne lands and the lands in tenure, see Co. Lit. 17 a; *A. G. v. Parsons*, 2 C. & J. 279, and the authorities cited in the judgment. As to the right of the tenants over the waste and of the lord to approve the waste, with and without the consent of the tenants, see *Boulcot v. Winmill*, 2 Camp. 261; *Betts v. Thompson*, L. R. 6 Ch. 732; *Warrick v. Queen's Coll. Ox.*, Ib. 716.

Numerous conjectures have been made as to the derivation of the word *manor*. A plausible one is from the French word *mesner*, to govern, which Coke notices as most agreeing with the nature of a manor, — "for a manor in these days signifieth the juris-

After the statute *Quia emptores* no new manor could be created. The grant of a fee no longer created a seignory and tenure, for the grantee held of the superior lord and not of the grantor. The lord, therefore, could not create freehold tenants to hold a court baron, which is an essential element in the constitution of a manor. Moreover, manors are sanctioned only by prescription or ancient custom; hence the king himself, though he can create a new tenure, cannot create a perfect manor at the present day. Co. Cop. s. 31; see *Bradshaw v. Lawson*, 4 T. R. 443.

A manor may become extinguished as a perfect manor, by the severance of the demesne lands from the seignory and services of the lands in tenure; as, if the lord transfer to some stranger the services of all his tenants and reserve unto himself the demesnes; or, if he grant away the demesnes and reserve the services. A manor may also be extinguished by the extinction of the services; as if the lord purchase all the land of the freeholders, or release unto his freeholders all their services. Co. Cop. s. 31; *Sir Moyle Finch's Case*, 6 Co. Rep. 63 a.

A manor might also be extinguished by failure of the court baron. Two freeholders of the manor, at least, were necessary to hold the court baron; consequently, if this number of tenants failed, the court could no longer be constituted, and the manor, without a court baron, ceased legally to exist.¹

But in all the above cases of extinction, though the manor no longer exists in its legal integrity, it may continue as a manor *by repute*, — *nomine tantum*; and it may still be attended with such of the rights and incidents of the original manor as may remain unaffected by the legal extinction.²

It may here be mentioned that besides the freehold tenants holding fees of the manor, there is, in many manors, a class of tenants occupying parts of the demesne lands without acquiring fees or freehold estates. They hold under a distinct tenure known as customary or copyhold tenure. Corresponding to which is the customary branch of the Court

diction and royalty incorporate, rather than the land or site." Co. Cop. s. 31; approved by Watkins, Cop. p. 7. In this view of a manor it is included in the list of Franchises, — the definition of a franchise being "a royal privilege or branch of the king's prerogative, subsisting in the hands of a subject." 2 Blackst. Com. 37. *Manor* has also been derived *a manendo*, as being the seat of the feudal lord. Co. Lit. 58 a; Spelman; 2 Blackst. Com. 90. Manors, together with most of the other elements of feudality, are said to have had their commencement, historically, in England in Saxon times. Co. Lit. 58 b; and see 1 Spence Eq. Jur. p. 64, and authorities there referred to. But they were consolidated into a system of general application at the Conquest. 1 Spence, 90.

¹ Co. Lit. 58 a; Co. Cop. s. 31; see *Chetwode v. Crew*, Willes, 614; *Bradshaw v. Lawson*, 4 T. R. 443. The jurisdiction of the Court Baron in writs of right concerning lands within the manor was expressly abolished by 3 & 4 Will. IV. c. 27, s. 36, and in all other matters the court has been either superseded or fallen into disuse. See a provision for the surrender of manorial courts in which debts or demands may be recovered, 9 & 10 Vict. c. 95 (the County Courts Act), s. 14.

² Co. Cop. s. 31; see 6 Co. 64 a, 66 b; *Soane v. Ireland*, 10 East, 259; *Watkin's Cop. by Coventry*, p. 27, n. (1), *Ib.* p. 48; as the right to manorial wastes, *Ib.*

Baron having jurisdiction over these customary tenancies of the demesne lands. In this branch of the court the lord or his steward is the judge; and it may still be held though the freehold branch of the Court Baron may have become extinct. Co. Lit. 58 *a*; *post*, Part I. c. ii. "Customary Tenure."

Another distinct court frequently existed as a franchise of a manor called the Court Leet, exercising a general criminal and administrative jurisdiction within the manor. This court was not a necessary incident of a manor, but appertained to the lord only by special prescription or special grant of the franchise from the Crown; its jurisdiction has been wholly superseded by other courts and officers. Co. Cop. s. 31; 4 Inst. c. 54; see Kitchen on Courts.¹

SECTION III.

MILITARY TENURES.

1. *Services*.

1 P. & M. Hist. (2d ed.) 254. By far the greater part of England is held of the king by knight's service (*per servitium militare*): it is comparatively rare for the king's tenants in chief to hold by any of the other tenures. In order to understand this tenure we must form the conception of a unit of military service. That unit seems to be the service of one knight or fully armed horseman (*servitium unius militis*) to be done to the king in his army for forty days in the year, if it be called for. In what wars such service must be done, we need not here determine; nor would it be easy to do so, for from time to time the king and his barons have quarrelled about the extent of the obligation, and more than one crisis of constitutional history has this for its cause. It is a question, we may say, which never receives any legal answer.²

LIT. §§ 95, 97. Escuage is called in Latin *scutagium*, that is, service of the shield; and that tenant which holdeth his land by escuage, holdeth by knight's service. And also it is commonly said, that some hold by the service of one knight's fee, and some by the half of a knight's fee. And it is said that when the king makes a voyage royal into Scotland to subdue the Scots, then he which holdeth by the service of one knight's fee ought to be with the king forty days, well and conveniently arrayed for the war. And he which holdeth his land by the moiety of a knight's fee ought to be with the king twenty days; and he which holdeth his land by the fourth part of a knight's fee ought

¹ See Co. Cop. s. 31; *Chetwode v. Crew*, Willes, 614; *Soane v. Ireland*, 10 East, 259. — Ed.

² Stubbs, Const. Hist. I. 563-4; II. 132, 278.

to be with the king ten days ; and so he that hath more, more, and he that hath less, less.

And after such a voyage royal into Scotland, it is commonly said, that by authority of parliament the escuage shall be assessed and put in certain ; *scil.*, a certain sum of money, how much every one, which holdeth by a whole knight's fee, who was neither by himself, nor by any other, with the king, shall pay to his lord of whom he holds his land by escuage. As put the case that it was ordained by the authority of the parliament, that every one which holdeth by a whole knight's fee, who was not with the king, shall pay to his lord forty shillings ; then he which holdeth by the moiety of a knight's fee shall pay to his lord but twenty shillings ; and he which holdeth by the fourth part of a knight's fee shall pay but ten shillings ; and he which hath more, more, and which less, less.

Co. Litt. 72 *b*. No escuage was assessed by parliament since the reign of Edward II., and in the eighth year of his reign escuage was assessed.

Litt. §§ 98, 100, 103, 110–112. And some hold by the custom, that if escuage be assessed by authority of parliament at any sum of money, that they shall pay but the moiety of that sum, and some but the fourth part of that sum. But because the escuage that they should pay is uncertain, for that it is not certain how the parliament will assess the escuage, they hold by knight's service. But otherwise it is of escuage certain, of which shall be spoken in the tenure of socage.

And it is to be understood that when escuage is so assessed by authority of parliament, every lord, of whom the land is holden by escuage, shall have the escuage so assessed by parliament ; because it is intended by the law that at the beginning such tenements were given by the lords to the tenants to hold by such services, to defend their lords as well as the king, and to put in quiet their lords and the king from the Scots aforesaid.

Litt. § 111. Also divers tenants hold of their lords by knight's service, and yet they hold not by escuage, neither shall they pay escuage ; as they which hold of their lords by castle-ward, that is to say, to ward a tower of the castle of their lord, or a door of some other place of the castle, upon reasonable warning, when their lords hear that the enemies will come, or are come in England. And in many other cases a man may hold by knight's service, and yet he holdeth not by escuage, nor shall pay escuage, as shall be said in the tenure by grand serjeanty.

Litt. §§ 85, 90–93, 95, 97. Homage is the most honorable service, and most humble service of reverence that a franktenant may do to his lord. For when the tenant shall make homage to his lord he shall be ungirt and his head uncovered, and his lord shall sit, and the tenant shall kneel before him on both his knees, and hold his hands jointly together between the hands of his lord, and shall say thus : I become your man (*Jeo deveigne vostre home*) from this day forward of life and limb, and of earthly worship, and unto you shall be true and faithful,

and bear to you faith for the tenements that I claim to hold of you, saving the faith that I owe unto our sovereign lord the king; and then the lord so sitting shall kiss him.

Note, none shall do homage but such as have an estate in fee simple, or fee tail, in his own right, or in the right of another, for it is a maxim in law, that he which hath an estate but for term of life, shall neither do homage or take homage. For if a woman hath lands or tenements in fee simple, or in fee tail, which she holdeth of her lord by homage, and taketh husband, and have issue, then the husband in the life of the wife shall do homage, because he hath title to have the tenements by the curtesy of England if he surviveth his wife, and also he holdeth in right of his wife. But if the wife dies before homage done by the husband in the life of his wife, and the husband holdeth himself in as tenant by the curtesy, then he shall not do homage to his lord, because he then hath an estate but for term of life.

More shall be said of homage in the tenure of homage ancestral.

Fealty is the same that *fidelitas* is in Latin. And when a freeholder doth fealty to his lord, he shall hold his right hand upon a book, and shall say thus: Know ye this, my lord, that I shall be faithful and true unto you, and faith to you shall bear for the lands which I claim to hold of you, and that I shall lawfully do to you the customs and services which I ought to do, at the terms assigned, so help me God and his saints; and he shall kiss the book. But he shall not kneel when he maketh his fealty, nor shall make such humble reverence as is aforesaid in homage.

And there is great diversity between the doing of fealty and of homage: for homage cannot be done to any but to the lord himself; but the steward of the lord's court, or bailiff, may take fealty for the lord.

Also, tenant for term of life shall do fealty, and yet he shall not do homage. And divers other diversities there be between homage and fealty.

LIT. §§ 143, 147, 153. Tenant by homage ancestral is, where a tenant holdeth his land of his lord by homage, and the same tenant and his ancestors, whose heir he is, have holden the same land of the same lord and of his ancestors, whose heir the lord is, time out of memory of man, by homage, and have done to them homage. And this is called homage ancestral, by reason of the continuance, which hath been, by title of prescription, in the tenancy in the blood of the tenant, and also in the seignory in the blood of the lord. And such service of homage ancestral draweth to it warranty, that is to say, that the lord which is living and hath received the homage of such tenant, ought to warrant his tenant, when he is impleaded of the land holden of him by homage ancestral.

Also, if a man which holds his land by homage ancestral alien to another in fee, the alienee shall do homage to his lord; but he holdeth not of his lord by homage ancestral, because the tenancy was not continued in the blood of the ancestors of the alienee; neither shall the

alienee have warranty of the land of his lord ; because the continuance of the tenancy in the tenant and to his blood by the alienation is discontinued. And so see that if the tenant which holdeth his land of his lord by homage ancestral alieneth in fee, though he taketh an estate again of the alienee in fee, yet he holds the land by homage, but not by homage ancestral.

Tenure by grand serjeanty is, where a man holds his lands or tenelements of our sovereign lord the king, by such services as he ought to do in his proper person to the king, as to carry the banner of the king, or his lance, or to lead his army, or to be his marshal, or to carry his sword before him at his coronation, or to be his sewer at his coronation, or his carver, or his butler, or to be one of his chamberlains of the receipt of his exchequer, or to do other like services, &c. And the cause why this service is called grand serjeanty is, for that it is a greater and more worthy service than the service in the tenure of escuage. For he, which holdeth by escuage, is not limited by his tenure to do any more especial service than any other which holdeth by escuage, ought to do. But he, which holdeth by grand serjeanty, ought to do some special service to the king, which he that holds by escuage ought not to do.

Co. Litt. 105 b. This tenure hath seven special properties, — 1. To be holden of the king only. 2. It must be done, when the tenant is able, in proper person. 3. This service is certain and particular. 4. The relief due in respect of this tenure differeth from knight's service. 5. It is to be done within the realm. 6. It is subject to neither *aid pur faire fitz chivaler*, or *file marier*. And, 7, It payeth no escuage.

Litt. § 156. Also, it is said that in the marches of Scotland some hold of the king by cornage, that is to say, to wind a horn to give men of the country warning when they hear that the Scots or other enemies are come or will enter into England ; which service is grand serjeanty. But if any tenant hold of any other lord than of the king by such service of cornage, this is not grand serjeanty, but it is knight's service, and it draweth to it ward and marriage ; for none may hold by grand serjeanty but of the king only.¹

2. Incidents.

2 BL. COM. 63. [The tenure of knight-service] drew after it these seven fruits and consequences, as inseparably incident to the tenure in chivalry ; viz. aid, relief, primer seisin, wardship, marriage, fines for alienation, and escheat : all of which I shall endeavor to explain, and to show to be of feudal original.

A. Aids.

2 BL. COM. 63. Aids were originally mere benevolences granted by the tenant to his lord, in times of difficulty and distress ; but in process of time they grew to be considered as a matter of right, and not of dis-

¹ But see 1 P. & M. Hist. (2d ed.) 285. — ED.

cretion. These aids were principally three; first, to ransom the lord's person, if taken prisoner. . . . Secondly, to make the lord's eldest son a knight. . . . Thirdly, to marry the lord's eldest daughter, by giving her a suitable portion.

MAGNA CARTA, c. 15 (Charter of King John). We will not give leave to any one, for the future, to take an aid of his own freemen, except for redeeming his own body, and for making his eldest son a knight, and for marrying once his eldest daughter; and not that unless it be a reasonable aid.

ST. 3 EDW. I. ST. OF WESTM. I. (1275), c. 36. For as much as before this time, reasonable aid to make one's son knight, or marry his daughter was never put in certain, nor how much should be taken, nor at what time, whereby some levied unreasonable aid, and more often than seemed necessary, whereby the people were sore grieved: it is provided that from henceforth of a whole knight's fee there be taken but 20*s.* And of 20 pound land holden in socage 20*s.*, and of more, more, and of less, less; after the rate. And that none shall levy such aid to make his son knight, until his son be fifteen years of age; nor to marry his daughter until she be of the age of seven years. And of that there shall be made mention in the king's writ, formed on the same, when any will demand it. And if it happen that the father, after he hath levied such aid of his tenants, die before he hath married his daughter, the executors of the father shall be bound to the daughter, for so much as the father received for the aid. And if the father's goods be not sufficient, his heir shall be charged therewith unto the daughter.¹

B. *Relief and Primer Seisin.*

2 BL. COM. 65. Relief, relevium, was before mentioned as incident to every feudal tenure, by way of fine or composition with the lord for taking up the estate, which was lapsed or fallen in by the death of the last tenant. But though reliefs had their original while feuds were only life-estates, yet they continued after feuds became hereditary; and were therefore looked upon, very justly, as one of the greatest grievances of tenure: especially when, at first, they were merely arbitrary and at the will of the lord; so that, if he pleased to demand an exorbitant relief it was in effect to disinherit the heir.

MAGNA CARTA, c. 2. If any of our earls or barons, or any other which hold of us in chief by knight's service, die, and at the time of his death his heir be of full age, and oweth to us relief, he shall have his inheritance by the old relief; that is to say, the heir or heirs of an earl, for a whole earldom, by one hundred pound; the heir or heirs of a baron, for a whole barony, by one hundred marks; the heir or heirs of a knight for one whole knight's fee, one hundred shillings at the

¹ See 25 EDW. III. ST. OF PURVEYORS (1351). — ED.

most; and he that hath less shall give less, according to the old custom of the fees.

c. 3. But if the heir of any such be within age, his lord shall not have the ward of him, nor of his land, before that he hath taken of him homage; and after that such an heir hath been in ward, when he is come to full age, that is to say, to the age of one and twenty years, he shall have his inheritance without relief and without fine; so that if such an heir, being within age, be made knight, yet nevertheless his land shall remain in the keeping of his lord unto the term aforesaid.

2 BL. COM. 66. *Primer seisin* was a feudal burthen, only incident to the king's tenants *in capite*, and not to those who held of inferior or mesne lords. It was a right which the king had, when any of his tenants *in capite* died seised of a knight's fee, to receive of the heir (provided he were of full age) one whole year's profits of the lands, if they were in immediate possession; and half a year's profits, if the lands were in reversion expectant on an estate for life. This seems to be little more than an additional relief, but grounded upon this feudal reason; that, by the antient law of feuds, immediately upon a death of a vassal the superior was entitled to enter and take seisin or possession of the land, by way of protection against intruders, till the heir appeared to claim it, and receive investiture; during which interval the lord was entitled to take the profits; and, unless the heir claimed within a year and day, it was by the strict law a forfeiture. This practice however seems not to have long obtained in England, if ever, with regard to tenure under inferior lords.¹

C. *Wardship and Marriage.*

2 BL. COM. 67. These payments were only due if the heir was of full age; but if he was under the age of twenty-one, being a male, or fourteen, being a female, the lord was entitled to the *wardship* of the heir, and was called the guardian in chivalry. This wardship consisted in having the custody of the body and lands of such heir, without any account of the profits, till the age of twenty-one in males, and sixteen in females. For the law supposed the heir-male unable to perform knight-service till twenty-one; but as for the female, she was supposed capable at fourteen to marry, and then her husband might perform the service. The lord therefore had no wardship, if at the death of the ancestor the heir-male was of the full age of twenty-one, or the heir female of fourteen; yet, if she was then under fourteen, and the lord once had her in ward, he might keep her so till sixteen, by virtue of the statute of Westm. 1, 3 Edw. I. c. 22, the two additional years being given by the legislature for no other reason but merely to benefit the lord.

This wardship, so far as it related to land, though it was not nor could be part of the law of feuds, so long as they were arbitrary, tem-

¹ See 1 P. & M. Hist. bk. 2, c. 1, § 7.

porary, or for life only ; yet when they became hereditary, and did consequently often descend upon infants, who by reason of their age could neither perform nor stipulate for the services of the feud, does not seem upon feodal principles to have been unreasonable. For the wardship of the land, or custody of the feud, was retained by the lord, that he might, out of the profits thereof, provide a fit person to supply the infant's services, till he should be of age to perform them himself. And if we consider the feud in its original import as a stipend, fee, or reward for actual service, it could not be thought hard that the lord should withhold the stipend, so long as the service was suspended. Though undoubtedly to our English ancestors, where such a stipendiary donation was a mere supposition or figment, it carried abundance of hardship ; and accordingly it was relieved by the charter of Henry I., before mentioned, which took this custody from the lord, and ordained that the custody, both of the land and the children, should belong to the widow or next of kin. But this noble immunity did not continue many years.

The wardship of the body was a consequence of the wardship of the land ; for he who enjoyed the infant's estate was the properest person to educate and maintain him in his infancy ; and also, in a political view, the lord was most concerned to give his tenant a suitable education, in order to qualify him the better to perform those services which in his maturity he was bound to render.

When the male heir arrived at the age of twenty-one, or the heir female to that of sixteen, they might sue out their livery or *ouster-lemain* ; that is, the delivery of their lands out of their guardian's hands. For this they were obliged to pay a fine, namely, half a year's profits of the land ; though this seems expressly contrary to *magna carta*. However, in consideration of their lands having been so long in ward, they were excused all reliefs, and the king's tenants also all primer seisins.

2 BL. COM. 70. But, before they came of age, there was still another piece of authority, which the guardian was at liberty to exercise over his infant wards ; I mean the right of *marriage* (*maritagium*, as contradistinguished from *matrimonium*), which in its feodal sense signifies the power, which the lord or guardian in chivalry had, of disposing of his infant ward in matrimony. For, while the infant was in ward, the guardian had the power of tendering him or her a suitable match, without *disparagement* or inequality : which, if the infants refused, they forfeited the value of the marriage, *valorem maritagii*, to their guardian ; that is, so much as a jury would assess, or any one would *bona fide* give to the guardian for such an alliance : and, if the infants married themselves without the guardian's consent, they forfeited double the value, *duplicem valorem maritagii*. This seems to have been one of the greatest hardships of our ancient tenures. There were indeed substantial reasons why the lord should have the *restraint* and *control* of the ward's marriage, especially of his female ward ; because of their tender years, and the danger of such female ward's intermarrying with the lord's

enemy; but no tolerable pretence could be assigned why the lord should have the *sale* or *value* of the marriage.

LIT. §§ 103, 110. Tenure by homage, fealty, and escuage is to hold by knight's service (*per service de chivaler*), and it draweth to it ward (*gard*), marriage, and relief. For when such tenant dieth, and his heir male be within the age of twenty-one years, the lord shall have the land holden of him until the age of the heir of twenty-one years; the which is called full age, because such heir, by intendment of the law, is not able to do such knight's service before his age of twenty-one years. And also if such heir be not married at the time of the death of his ancestor, then the lord shall have the wardship and marriage of him. But if such tenant dieth, his heir female being of the age of fourteen years or more, then the lord shall not have the wardship of the land, nor of the body; because that a woman of such age may have a husband able to do knight's service. But if such heir female be within the age of fourteen years, and unmarried at the time of the death of her ancestor, the lord shall have the wardship of the land holden of him until the age of such heir female of sixteen years; for it is given by the statute of W[estm]. I. cap. 22, that by the space of two years next ensuing the said fourteen years, the lord may tender covenable marriage without disparagement to such heir female. And if the lord within the said two years do not tender such marriage, &c., then she at the end of the said two years may enter, and put out her lord. But if such heir female be married within the age of fourteen years, in the life of her ancestor, and her ancestor dieth, she being within the age of fourteen years, the lord shall have only the wardship of the land until the end of the fourteen years of age of such heir female, and then her husband and she may enter into the land and oust the lord. For this is out of the case of the said statute, insomuch as the lord cannot tender marriage to her which is married, &c. For before the said statute of W[estm]. I. such issue female, which was within the age of fourteen years at the time of the death of her ancestor, and after she had accomplished the age of fourteen years, without any tender of marriage by the lord unto her, such heir female might have entered into the land and ousted the lord, as appeareth by the rehearsal and words of the said statute; so as the said statute was made (as it seemeth) in such case altogether for the advantage of lords. But yet this is always intended by the words of the same statute, that the lord shall not have these two years after the fourteen years, as is aforesaid, but where such heir female is within the age of fourteen years, and unmarried at the time of the death of her ancestor.

And of heirs males which be within the age of twenty-one years after the decease of their ancestor, and not married, in this case the lord shall have the marriage of such heir, and he shall have time and space to tender to him covenable marriage without disparagement within the said time of twenty-one years. And it is to be understood that the heir

in this case may choose whether he will be married or no; but if the lord, which is called guardian in chivalry, tenders to such heir covenable marriage within the age of twenty-one years without disparagement, and the heir refuseth this, and doth not marry himself within the said age, then the guardian shall have the value of the marriage of such heir male. But if such heir marrieth himself within the age of twenty-one years, against the will of the guardian in chivalry, then the guardian shall have the double value of the marriage by force of the statute of Merton aforesaid, as in the same statute is more fully at large comprised.¹

D. *Fines for Alienation.*

2 BL. COM. 71. Another attendant or consequence of tenure by knight-service was that of *fines* due to the lord for every *alienation*, whenever the tenant had occasion to make over his land to another. This depended on the nature of the feudal connection; it not being reasonable or allowed, as we have before seen, that a feudatory should transfer his lord's gift to another, and substitute a new tenant to do the service in his own stead, without the consent of the lord; and as the feudal obligation was considered as reciprocal, the lord also could not alienate his seignory without the consent of his tenant, which consent of his was called an *attornment*. This restraint upon the lords soon wore away; that upon the tenants continued longer.²

E. *Escheat.*

2 BL. COM. 72. The last consequence of tenure in chivalry was *escheat*; which is the determination of the tenure, or dissolution of the mutual bond between the lord and tenant, from the extinction of the blood of the latter by either natural or civil means; if he died without heirs of his blood, or if his blood was corrupted and stained by commission of treason or felony; whereby every inheritable quality was entirely blotted out and abolished. In such cases the land escheated, or fell back, to the lord of the fee; that is, the tenure was determined by breach of the original condition expressed or implied in the feudal donation.

¹ See St. 20 Hen. III. St. of Merton (1235), cc. 6, 7; St. Edw. I. St. of Westm. I. (1275), c. 22; *Palmer's Case*, 5 Co. 126 b; *Darcy's Case*, 6 Co. 70 b. — ED.

² "The tenant originally could not alien his fee without the license of the lord, for granting which a fine or payment was charged. The statute *Quia emptores* enabled tenants to alien without license; but this statute did not extend to the tenants *in capite* of the Crown. The claim of the Crown was afterwards settled by statute at a reasonable fine, which was adjudged to be one-third of the yearly value for license, and one year's value upon alienation without license. 18 Edw. I. c. 1; 1 Edw. III. c. 12; 34 Edw. III. c. 15; Co. Lit. 43 a, b; 2 Inst. 67." — Leake, Dig. Land Law, 28.

SECTION IV.

SOCAGE TENURE.

1. *Services.*

LIT. §§ 117, 118, 120, 121. Tenure in socage is where the tenant holdeth of his lord the tenancy by certain service for all manner of services, so that the service be not knight's service. As where a man holdeth his land of his lord by fealty and certain rent, for all manner of services; or else where a man holdeth his land by homage, fealty, and certain rent, for all manner of services; or where a man holdeth his land by homage and fealty for all manner of services; for homage by itself maketh not knight's service.

Also, a man may hold of his lord by fealty only, and such tenure is tenure in socage; for every tenure which is not tenure in chivalry, is a tenure in socage.

Also, if a man holdeth of his lord by escuage certain, *scil.* in this manner, when the escuage runneth and is assessed by parliament to a greater or lesser sum, that the tenant shall pay to his lord but half a mark for escuage, and no more nor less, to how great a sum, or to how little the escuage runneth, &c., such tenure is tenure in socage, and not knight's service. But where the sum which the tenant shall pay for escuage is uncertain, *scil.* where it may be that the sum that the tenant shall pay for escuage to his lord may be at one time more and at another time less, according as it is assessed, &c., such tenure is tenure by knight's service.

Also, if a man holdeth his land to pay a certain rent to his lord for castle-guard, this tenure is tenure in socage. But where the tenant ought by himself or by another to do castle-guard, such tenure is tenure by knight's service.

LIT. §§ 130-132, 159-165. Also, if any will ask why a man may hold of his lord by fealty only for all manner of services, insomuch as when the tenant shall do his fealty, he shall swear to his lord that he will do to his lord all manner of services due, and when he hath done fealty, in this case no other service is due. To this it may be said, that where a tenant holds his land of his lord, it behooveth that he ought to do some service to his lord. For if the tenant nor his heirs ought to do no manner of service to his lord nor his heirs, then by long continuance of time it would grow out of memory, whether the land were holden of the lord or of his heirs, or not, and then will men more often and more readily say, that the land is not holden of the lord, nor of his heirs, than otherwise; and hereupon the lord shall lose his escheat of the land, or perchance some other forfeiture or profit which he might have of the land. So it is reason, that the lord and his heirs have some

service done unto them, to prove and testify that the land is holden of them.

And for that fealty is incident to all manner of tenures, but to the tenure in frankalmoign (as shall be said in the tenure of frankalmoign), and for that the lord would not at the beginning of the tenure have any other service but fealty, it is reason, that a man may hold of his lord by fealty only; and when he hath done his fealty, he hath done all his services.

Also, if a man letteth to another lands or tenements for term of life, without naming any rent to be reserved to the lessor, yet he shall do fealty to the lessor, because he holdeth of him. Also if a lease be made to a man for term of years, it is said that the lessee shall do fealty to the lessor, because he holdeth of him. And this is well proved by the words of the writ of waste, when the lessor hath cause to bring a writ of waste against him; which writ shall say, that the lessee holds his tenements of the lessor for term of years. So the writ proves a tenure between them. But he which is tenant at will according to the course of the common law, shall not do fealty, because he hath not any sure estate. But otherwise it is of tenant at will according to the custom of the manor; for that he is bound to do fealty to his lord for two causes. The one is by reason of the custom; and the other is, for that he taketh his estate in such form to do his lord fealty.

Tenure by petit serjeanty is, where a man holds his land of our sovereign lord the king to yield to him yearly a bow, or a sword, or a dagger, or a knife, or a lance, or a pair of gloves of mail, or a pair of gilt spurs, or an arrow, or divers arrows, or to yield such other small things belonging to war.

And such service is but socage in effect; because that such tenant by his tenure ought not to go, nor do anything, in his proper person, touching the war, but to render and pay yearly certain things to the king, as a man ought to pay a rent.

And note, that a man cannot hold by grand serjeanty, nor by petit serjeanty, but of the king, &c.

Tenure in burgage is where an ancient borough is, of which the king is lord, and they that have tenements within the borough hold of the king their tenements; that every tenant for his tenement ought to pay to the king a certain rent by year, &c. And such tenure is but tenure in socage.

And the same manner is, where another lord, spiritual or temporal, is lord of such a borough, and the tenants of the tenements in such a borough hold of their lord to pay each of them yearly an annual rent.

And it is called tenure in burgage, for that the tenements within the borough be holden of the lord of the borough by certain rent, &c. And it is to wit that the ancient towns called boroughs be the most ancient towns that be within England; for the towns that now be cities or counties, in old time were boroughs, and called boroughs; for of

such old towns called boroughs come the burgesses of the parliament to the parliament, when the king hath summoned his parliament.

Also, for the greater part such boroughs have divers customs and usages which be not had in other towns. For some boroughs have such a custom that if a man have issue many sons and dieth, the youngest son shall inherit all the tenements which were his father's within the same borough, as heir unto his father by force of the custom; the which is called borough English.

2. *Incidents.*

LIT. §§ 126–129. Also, the lord of whom the land is holden in socage, after the decease of his tenant, shall have relief in this manner. If the tenant holdeth by fealty and certain rent to pay yearly, &c., if the terms of payment be to pay at two terms of the year, or at four terms in the year, the lord shall have of the heir his tenant as much as the rent amounts unto, which he payeth yearly. As if the tenant holds of his lord by fealty, and ten shillings rent payable at certain terms of the year, then the heir shall pay to the lord ten shillings for relief, beside the ten shillings which he payeth for the rent.

And in this case, after the death of the tenant, such relief is due to the lord presently, of what age soever the heir be; because such lord cannot have the wardship of the body nor of the land of the heir. And the lord in such case ought not to attend for the payment of his relief, according to the terms and days of payment of the rent; but he is to have his relief presently, and therefore he may forthwith distrain after the death of his tenant for relief.

In the same manner it is, where the tenant holdeth of his lord by fealty and a pound of pepper or cummin, and the tenant dieth, the lord shall have for relief a pound of cummin or a pound of pepper, besides the common rent. In the same manner it is, where the tenant holdeth to pay yearly a number of capons or hens, or a pair of gloves, or certain bushels of corn, or such like.

But in some case the lord ought to stay to distrain for his relief until a certain time. As if the tenant holds of his lord by a rose, or by a bushel of roses, to pay at the feast of St. John the Baptist, if such tenant dieth in winter, then the lord cannot distrain for his relief until the time that roses by the course of the year may have their growth, &c. And so of the like.

Co. LIT. 77 a. He that holdeth of the king by socage in chief, and dieth, his heir of full age, the king shall have livery and *primer seisin* only of the lands so holden, and not of the lands holden of others. But if the heir of such a tenant in socage in chief be within the age of fourteen at the death of his ancestor, he shall neither sue livery, nor pay *primer seisin*, either then or any time after; and the reason thereof is, for that the custody of his body and lands in that case belong to the *prochein amy*, as guardian in socage. Neither shall the king have

primer seisin of lands holden in burgage (as some have said), for that it is no tenure *in capite*.

LIT. 123. Also, in such tenures in socage, if the tenant have issue and die, his issue being within the age of fourteen years, then the next friend (*le prochain amy*) of that heir, to whom the inheritance cannot descend (*a que le heritage ne poet descendre*), shall have the wardship of the land and of the heir until the age of fourteen years, and such guardian is called guardian in socage. For if the land descend to the heir of the part of the father, then the mother, or other next cousin of the part of the mother, shall have the wardship. And if land descend to the heir of the part of the mother, then the father, or next friend of the part of the father, shall have the wardship of such lands or tenements. And when the heir cometh to the age of fourteen years complete, he may enter and oust the guardian in socage, and occupy the land himself if he will. And such guardian in socage shall not take any issues or profits of such lands or tenements to his own use, but only to the use and profit of the heir; and of this he shall render an account to the heir when it pleaseth the heir, after he accomplisheth the age of fourteen years. But such guardian upon his account shall have allowance of all his reasonable costs and expenses in all things, &c. And if such guardian marry the heir within age of fourteen years, he shall account to the heir or his executors of the value of the marriage, although that he took nothing for the value of the marriage; for it shall be accounted his own folly that he would marry him without taking the value of the marriage, unless that he marrieth him to such a marriage that is as much worth in value as the marriage of the heir.

2 BL. COM. 89. Escheats are equally incident to tenure in socage, as they were to tenure by knight-service; except only in gavelkind lands, which are subject to no escheats for felony, though they are to escheats for want of heirs.

REAL PROP. COMMRS. THIRD REPORT, 8. This tenure [free and common socage] has all the advantages of allodial ownership. The *dominium utile* vested in the tenant comprises the sole and undivided interest in the soil. Escheat is the only material incident of the tenure beneficial to the lord; and, while there is an heir or devisee, he can in no way interfere. The tenant in fee-simple of socage land can of his own authority create in it any estates and interests not contrary to the general rules of law; he can alien it entirely, or devise it to whom he pleases, and the alienee or devisee takes directly from him, so that the title is complete without the concurrence or privity of the lord.

3. *Gavelkind*.

LIT. § 265. Parceners by the custom are, where a man seised in fee simple or in fee tail of lands or tenements which are of the tenure called gavelkind within the county of Kent, and hath issue divers sons and die, such lands or tenements shall descend to all the sons by the cus-

tom, and they shall equally inherit and make partition by the custom, as females shall do, and a writ of partition lieth in this case as between females. But it behooveth in the declaration to make mention of the custom. Also such custom is in other places of England, and also such custom is in North Wales, &c.

2 BL. COM. 84. It is universally known what struggles the Kentish men made to preserve their ancient liberties, and with how much success those struggles were attended.¹ And as it is principally here that we meet with the custom of gavelkind² (though it was and is to be found in some other parts of the kingdom), we may fairly conclude that this was a part of those liberties; agreeably to Mr. Selden's opinion, that gavelkind before the Norman Conquest was the general custom of the realm. The distinguishing properties of this tenure are various; some of the principal are these: 1. The tenant is of age sufficient to alien his estate by feoffment at the age of fifteen. 2. The estate does not escheat in case of an attainder and execution for felony; their maxim being, "The father to the bough, the son to the plough." 3. In most places he had a power of devising lands by will, before the statute for that purpose was made. 4. The lands descend, not to the eldest, youngest, or any one son only, but to all the sons together; which was indeed anciently the most usual course of descent all over England, though in particular places particular customs prevailed. These, among other properties, distinguished this tenure in a most remarkable manner: and yet it is said to be only a species of a socage tenure, modified by the custom of the country; the lands being holden by suit of court and fealty, which is a service in its nature certain.³

¹ See 2 P. & M. Hist. (2d ed.) 271.

² See *In re Chenoweth*, [1902] 2 Ch. 488.

³ ANCIENT DEMESNE. "There is great confusion in the law books respecting this tenure. All agree that it exists in those manors, and in those only, which belonged to the Crown in the reign of Edward the Confessor and William the Conqueror, and in Domesday Book are denominated *Terræ Regis*. But the copyholders of these manors are sometimes considered tenants in Ancient Demesne, and land held in ancient demesne is said to pass by surrender and admittance. This appears to be inaccurate. It is only the freeholders of the manor who are truly tenants in ancient demesne, and land held in ancient demesne passes by common law conveyances without the instrumentality of the lord. The copyholders in an ancient demesne manor, like other copyholders, are merely to be considered as occupying a part of the lord's demesne, and do not hold of the manor. They form the Customary Court. The Court of Ancient Demesne, which is analogous to the Court Baron, is constituted by those who hold in socage of the lord of the manor. . . . The tenants in ancient demesne, properly so called, were made subject to certain restraints and entitled to certain immunities, which produce serious inconveniences at the present day. They were forbidden to bring or to defend any real action touching their tenements, except in the lord's court; and they were exempted from serving on juries elsewhere, and from paying toll in any part of England." — Third Report of Commissioners on the Law of Real Property, 12, 13. See 1 P. & M. Hist. bk. 2, c. 1, § 13.

SECTION V.

FRANKALMOIGN.

LIT. §§ 133, 135, 137, 139, 140, 141. Tenant in frankalmoign is, where an abbot, or prior, or another man of religion, or of holy church, holdeth of his lord in frankalmoign ; that is to say, in Latin, *in liberam eleemosinam*, that is, in free alms. And such tenure began first in old time. When a man in old time was seised of certain lands or tenements in his demesne as of fee, and of the same land infeoffed an abbot and his covent, or prior and his covent, to have and to hold to them and their successors in pure and perpetual alms, or in frankalmoign ; (or by such words to hold of the grantor, or of the lessor, and his heirs in free alms :) in such case the tenements were holden in frankalmoign.

And they, which hold in frankalmoign, are bound of right before God to make orisons, prayers, masses, and other divine services, for the souls of their grantor or feoffor, and for the souls of their heirs which are dead, and for the prosperity and good life and good health of their heirs which are alive. And therefore they shall do no fealty to their lord ; because that this divine service is better for them before God, than any doing of fealty ; and also because that these words (frankalmoign) exclude the lord to have any earthly or temporal service, but to have only divine and spiritual service to be done for him, &c.

But if an abbot, or prior, holds of his lord by a certain divine service, in certain to be done, as to sing a mass every Friday in the week, for the souls, *ut supra*, or every year at such a day to sing a *placebo et dirige*, &c., or to find a chaplain to sing a mass, &c., or to distribute in alms to an hundred poor men an hundred pence at such a day ; in this case, if such divine service be not done, the lord may distrain, &c., because the divine service is put in certain by their tenure, which the abbot or prior ought to do. And in this case the lord shall have fealty, &c., as it seemeth. And such tenure shall not be said to be tenure in frankalmoign, but is called tenure by divine service. For in tenure in frankalmoign no mention is made of any manner of service ; for none can hold in frankalmoign, if there be expressed any manner of certain service that he ought to do, &c.

And if an abbot holdeth of his lord in frankalmoign, and the abbot and covent under their common seal alien the same tenements to a secular man in fee simple, in this case the secular man shall do fealty to the lord ; because he cannot hold of his lord in frankalmoign. For if the lord should not have fealty of him, he should have no manner of service, which should be inconvenient, where he is lord, and the tenements be holden of him.

Also, if a man grant at this day to an abbot or to a prior lands or tenements in frankalmoign, these words (frankalmoign) are void; for it is ordained by the statute which is called *Qui emptores terrarum* (which was made *anno* 18 E. I.) that none may alien nor grant lands or tenements in fee simple to hold of himself. So that if a man seised of certain tenements, which he holdeth of his lord by knight's service, and at this day he, &c., granteth by license the same tenements to an abbot, &c., in frankalmoign, the abbot shall hold immediately the tenements by knight's service of the same lord of whom his grantor held, and shall not hold of his grantor in frankalmoign, by reason of the same statute. So that none can hold in frankalmoign, unless it be by title of prescription, or by force of a grant made to any of his predecessors before the same statute was made. But the king may give lands or tenements in fee simple to hold in frankalmoign, or by other services; for he is out of the case of that statute.

And note, that none may hold lands or tenements in frankalmoign but of the grantor, or of his heirs. And therefore it is said, that if there be lord, mesne and tenant, and the tenant is an abbot, which holdeth of his mesne in frankalmoign, if the mesne die without heir the mesnaltie shall come by escheat to the said lord paramount, and the abbot shall then hold immediately of him by fealty only, and shall do to him fealty; because he cannot hold of him in frankalmoign, &c.

SECTION VI.

ABOLITION OF MILITARY TENURES.

ST. 12 CAR. II. (1660) c. 24.

An Act taking away the Court of Wards and Liveries and Tenures in Capite, and by Knight-Service, and Purveyance, and for settling a Revenue upon his Majesty in lieu thereof.

Whereas it hath been found by former experience that the Court of Wards and Liveries and tenures by knight-service either of the king or others, or by knight-service *in capite*, or socage *in capite* of the king, and the consequents upon the same, have been much more burthensome, grievous and prejudicial to the kingdom than they have been beneficial to the king; and whereas since the intermission of the said court, which hath been from the four and twentieth day of February, which was in the year of our Lord one thousand six hundred forty and five, many persons have by will and otherwise made disposal of their lands held by knight-service, whereupon divers questions might possibly arise unless some seasonable remedy be taken to prevent the same; be it therefore enacted by the King our Sovereign Lord, with the assent of the Lords and Commons in Parliament assembled, and by the authority of the same, and it is hereby enacted, That the Court of Wards

and Liveries, and all wardships, liveries, primer seisins and *ousterlemains*, values and forfeitures of marriages, by reason of any tenure of the King's Majesty, or of any other by knight-service, and all mean rates, and all other gifts, grants, and charges, incident or arising for or by reason of wardships, liveries, primer seisins, or *ousterlemains* be taken away and discharged, and are hereby enacted to be taken away and discharged, from the said twenty-fourth day of February one thousand six hundred forty-five; any law, statute, custom, or usage to the contrary hereof in any wise notwithstanding: And that all fines for alienations, seizures, and pardons for alienations, tenure by homage, and all charges incident or arising for or by reason of wardship, livery, primer seisin, or *ousterlemain*, or tenure by knight-service, escuage, and also *aide pur file marrier, et pur faire fitz chivalier*, and all other charges incident thereunto, be likewise taken away and discharged from the said twenty-fourth day of February one thousand six hundred forty and five: any law, statute, custom, or usage to the contrary hereof in any wise notwithstanding: And that all tenures by knight-service of the king, or of any other person, and by knight-service *in capite*, and by socage *in capite* of the king, and the fruits and consequents thereon, happened or which shall or may hereafter happen or arise thereupon or thereby, be taken away and discharged; any law, statute, custom or usage to the contrary hereof in any wise notwithstanding: And all tenures of any honours, manors, lands, tenements, or hereditaments, of any estate of inheritance at the common law, held either of the king or of any other person or persons, bodies politick or corporate, are hereby enacted to be turned into free and common socage, to all intents and purposes, from the said twenty-fourth day of February one thousand six hundred forty-five, and shall be so construed, adjudged and deemed to be from the said twenty-fourth day of February one thousand six hundred forty-five, and for ever hereafter, turned into free and common socage; any law, statute, custom, or usage to the contrary hereof in any wise notwithstanding.

2. And that the same shall for ever hereafter stand and be discharged of all tenure by homage, escuage, voyages royal, and charges for the same, wardships incident to tenure by knight's-service, and values and forfeitures of marriage, and all other charges incident to tenure by knight-service, and of and from *aide pur file marrier*, and *aide pur faire fitz chivalier*; any law, statute, usage, or custom to the contrary in any wise notwithstanding. And that all conveyances and devises of any manors, lands, tenements, and hereditaments, made since the said twenty-fourth day of February, shall be expounded to be of such effect as if the same manors, lands, tenements, and hereditaments had been then held and continued to be holden in free and common socage only; any law, statute, custom, or usage to the contrary hereof in any wise notwithstanding.

3. And be it further ordained and enacted by the authority of this present Parliament, That one Act made in the reign of King Henry the

Eighth, intituled An Act for the Establishment of the Court of the King's Wards; and also one Act of Parliament made in the thirty-third year of the reign of the said King Henry the Eighth, concerning the officers of the Courts of Wards and Liveries, and every clause, article, and matter in the said acts contained, shall from henceforth be repealed and utterly void.

4. And be it further enacted by the authority aforesaid, That all tenures hereafter to be created by the King's Majesty, his heirs or successors, upon any gifts or grants of any manors, lands, tenements or hereditaments, of any estate of inheritance at the common law, shall be in free and common socage, and shall be adjudged to be in free and common socage only, and not by knight-service, or *in capite*, and shall be discharged of all wardship, value and forfeiture of marriage, livery, primer seisin, *ousterlemain*, *aide pur faire fitz chivalier* and *pur file marrier*; any law, statute, or reservation to the contrary thereof in any wise notwithstanding.

5. Provided nevertheless, and be it enacted, That this Act, or anything therein contained, shall not take away, nor be construed to take away, any rents certain, heriots, or suits of court, belonging or incident to any former tenure now taken away or altered by virtue of this Act, or other services incident or belonging to tenure in common socage due or to grow due to the King's Majesty, or mean lords, or other private person, or the fealty and distresses incident thereunto; and that such relief shall be paid in respect of such rents as is paid in case of a death of a tenant in common socage.

6. Provided always, and be it enacted, that anything herein contained shall not take away, nor be construed to take away, any fines for alienation due by particular customs of particular manors and places, other than fines for alienations of lands or tenements holden immediately of the king *in capite*.

7. Provided also, and be it further enacted, That this Act, or anything herein contained, shall not take away, or be construed to take away, tenures in frankalmoign, or to subject them to any greater or other services than they now are; nor to alter or change any tenure by copy of court-roll, or any services incident thereunto; nor to take away the honorary services of grand serjeanty, other than of wardship, marriage, and value of forfeiture of marriage, escuage, voyages royal, and other charges incident to tenure by knight-service; and other than *aide pur faire fitz chivalier*, and *aide pur file marrier*.¹

TENANCY IN CAPITE. "Tenure *in capite*, in its genuine sense, signifies a tenure of another *sine medio*, that is, immediately and without the interposition of any mesne or intermediate lord; and therefore when an honor or other seigniorie came into the hands of the Crown by escheat or otherwise, its tenants were as much tenants *in chief* to the king as those who were so by original grant from the Crown. In proof of this Mr. Madox selects from ancient records a great variety of instances between the 8th

¹ See Williams, Real Prop. (18th ed.) 54-57.

of Richard I. and the 20th of Henry VI. in which tenures *ut de honore* are expressly styled tenures *in capite*; and as Mr. Madox adds no instances of a later time than Henry the Eighth and Queen Elizabeth, in which the words *in capite* are omitted, it may be conjectured, that the error complained of by Mr. Madox originated soon after the time of Henry the Sixth. Mad. Baron. Angl. 181. The design of excluding tenures *ut de honore* from the description of tenures *in capite* was to distinguish those estates which were held of the king by a tenure originally created by the king, from those held of him by a tenure commencing by the subinfeudation of a subject; between which there were many differences in point of incident very essential both to the lord and tenant. Mad. Baron. Angl. 12. But it should have been recollected, that the distinction aimed at was already marked, with equal sufficiency and more correctness, by denominating tenures of the first sort tenures *ut de corona*, and those of the second tenures *ut de honore*. The influence of this mistaken notion of tenancy *in capite* is very evident, as well throughout the statute of Charles the Second for taking away the oppressive fruits of knight's service and tenure *in capite*, as in those grants from the Crown, which in the *tenendum* are expressed to be *ut de honore et non in capite*. See Mad. Excheq. fol. ed. 432. But great as this error about tenure *in capite* may be, Lord Coke is excusable for conforming in his language to it; because before his time it had been adopted by the legislature. See 37 H. 8, c. 20, s. 2, 3, 4. 1 E. 6, c. 4, s. 1, 2 & 3, and Mad. Baron. Angl. 233." — Hargrave's note to Co. Lit. 108 a.

TENURE IN THE UNITED STATES. Land in the colony of Virginia was holden of the king as of the "manor of East-Greenwich, in the county of Kent, in free and common socage only, and not *in capite*." Lucas, Chart. 8, 12, 22; so in Massachusetts, Id. 36, 75; so in Connecticut, Id. 54; so in Rhode Island, Id. 65. Land in Maryland was holden of the king as of the castle of Windsor, in the county of Berks, "in free and common socage, by fealty only, for all services, and not *in capite*, or by knight's service;" yielding annually "two Indian arrows of those parts." Id. 90. And the proprietary could grant land to be held of himself, the statute of *Quia emptores* notwithstanding. Id. 95. So in Pennsylvania, yielding "two beaver skins." Id. 101, 106. Land in Georgia was to be held of the king as of the manor of Hampton Court, in the county of Middlesex, in free and common socage, and not *in capite*, at a money rent. Id. 117.

"Our ancestors, in emigrating to this country, brought with them such parts of the common law and such of the English statutes as were of a general nature and applicable to their situation (1 Kent, 473, and cases cited in note *a* to the 5th ed.; *Bogardus v. Trinity Church*, 4 Paige, 178); and when the first Constitution of this State came to be framed, all such parts of the common law of England and of Great Britain and of the acts of the Colonial Legislature as together formed the law of the Colony at the breaking out of the Revolution, were declared to be the law of this State, subject, of course, to alteration by the legislature. (Art. 35.) The law as to holding lands and of transmitting the title thereto from one subject to another must have been a matter of the first importance in our colonial state; and there can be no doubt but that the great body of the English law upon that subject, so far as it regarded the transactions of private individuals, immediately became the law of the colony, subject to such changes as were introduced by colonial legislation. The lands were holden under grants from the Crown, and as the king was not within the statute *Quia emptores*, a certain tenure, which, after the act of 12 Charles II. (ch. 24) abolishing military tenures, must have been that of free and common socage, was created as between the king and his grantee. I have elsewhere expressed the opinion that the king might, notwithstanding the statute against subinfeudation, grant to his immediate tenant the right to alien his land to be holden of himself, and thus create a manor, where the land was not in tenure prior to the 18th Edward I. (*The People v. Van Rensselaer*, 5 Seld. 334.) But with the exception of the tenure arising upon royal grants, and such as might be created by the king's immediate grantees under express license from the Crown, I am of opinion that the law forbidding the creating of new tenants by means of subinfeudation was always the law of the Colony, and that it was the

law of this State, as well before as after the passage of our act concerning tenures, in 1787. A contrary theory would lead to the most absurd conclusions. We should have to hold that the feudal system, during the whole colonial period and for the first ten years of the State government, existed here in a condition of vigor which had been unknown in England for more than three centuries before the first settlement of this country. We should be obliged to resolve questions arising upon early conveyances, under which many titles are still held, by the law which prevailed in England during the first two centuries after the Conquest, before the commencement of the Year Books, and long before Littleton wrote his *Treatise upon Tenures*." Per DENIO, J., in *Van Rensselaer v. Hays*, 19 N. Y. 68, 73.

See Gray, *Perpetuities*, §§ 22-28.

CHAPTER II.

ESTATES.¹

SECTION I.

FEE-SIMPLE.

LIT. §§ 1, 2. Tenant in fee simple is he which hath lands or tenements to hold to him and his heirs for ever.² And it is called in Latin *feodum simplex*, for *feodum* is the same that inheritance is, and *simplex* is as much as to say, lawful, or pure. And so *feodum simplex* signifies a lawful or pure inheritance. *Quia feodum idem est quo hæreditas et simplex idem est quod legitimum vel purum. Et sic feodum simplex idem est quod hæreditas legitima vel hæreditas pura.* For if a man would purchase lands or tenements in fee-simple, it behooveth him to have these words in his purchase, To have and to hold to him and to his heirs: for these words (his heirs) make the estate of inheritance. For if a man purchase lands by these words, To have and to hold to him for ever; or by these words, To have and to hold to him and his assigns for ever: in these two cases he hath but an estate for term of life, for

¹ "It is to be known that a freehold is that which one holds to himself and his heirs in fee and inheritance, or in fee only to himself and his heirs. So also it is a freehold if one holds for life only or in the same way for an indeterminate time, without any certain limit of time; to wit, until something is done or not done, as if it is said, I give to such a one until I shall provide for him. But that cannot be called a freehold which one holds for a certain number of years, months, or days, although for a term of a hundred years which exceeds the lives of men. So that cannot be called a freehold which one holds at the will of his lords, which can be seasonably and unseasonably revoked, as from year to year, and from day to day." Bract, lib. 4, c. 28, fol. 207.

Estates for life and estates of inheritance, being the estates admissible at common law in land of freehold tenure, are called *freehold estates*. An estate for life is sometimes called specially an estate of freehold, or *the freehold*, as distinguished from the inheritance, which in this sense includes the freehold.

Thus the term freehold is used to denote the quantity or duration of estates as well as the tenure of the land; and, as applied to estates, even a customary tenant or copyholder may be said to have a freehold. "A tenant in fee simple, fee tail, or for life is said to have a freehold interest, whatever his tenure may be; but none except he who holds or did hold by knight's service, in free socage or in frankalmoign can be said to have a freehold tenure." Leake, Digest Land Law, 43.

² In the most solemn acts of law we express the strongest and highest estate that any subject can have, by these words: "he is seised thereof in his demesne, as of fee." (From 2 Bl. Com. *105.) — ED.

that there lack these words (his heirs), which words only make an estate of inheritance in all feoffments and grants.

And if a man purchase land in fee simple and die without issue, he which is his next cousin collateral of the whole blood, how far soever he be from him in degree (*de quel plus long degree qu'il soit*), may inherit and have the land as heir to him.¹

¹ "In the most ancient time [the feud] was so entirely in the power of the lords that when they wished they could take away a thing given by them as a feud. But afterwards they came to be good for a year only. Then it was determined that it should be continued for the life of the vassal; but since this by right of succession did not belong to sons, it was so extended that it did pass to sons; to whom [*in quem*], to wit, the lord was willing to give this benefice. Which to-day is so established, that it comes equally to all. But when Conrad was starting for Rome, the vassals who were in his service, prayed that by a law promulgated by him, he would deign to extend this from son to grandsons, and that a brother might succeed to a brother who had died without lawful heir in a benefice which was their fathers'. But if one of two brothers has received a feud from his lord, upon his death without lawful heir his brother does not succeed to the feud, because although they have received in common [*quod etsi communiter acceperint*], one does not succeed the other, unless it has been expressly so said, to wit, that upon the death of one without lawful heir, the other shall succeed; but if there is an heir, the other brother shall not take. . . . This also should be known that a benefice does not pass by succession to collateral relations beyond first cousins, according to the practice established by the ancient sages, although in modern times it has been carried to the seventh generation, which in male descendants is extended by the new law indefinitely." Lib. Feud. lib. 1, tit. 1, §§ 1, 2, 4.

"When feuds first began to be hereditary, it was made a necessary qualification of the heir who would succeed to a feud, that he should be of the blood of, that is, lineally descended from, the first feudatory or purchaser. In consequence whereof, if a vassal died seised of a feud of his own acquiring, or *feudum novum*, it could not descend to any but his own offspring; no, not even to his brother, because he was not descended, nor derived his blood, from the first acquirer. But if it was *feudum antiquum*, that is, one descended to the vassal from his ancestors, then his brother, or such other collateral relation as was descended and derived his blood from the first feudatory, might succeed to such inheritance. . . .

"However, in process of time, when the feudal rigor was in part abated, a method was invented to let in the collateral relations of the grantee to the inheritance, by granting him a *feudum novum* to hold *ut feudum antiquum*; that is, with all the qualities annexed of a feud derived from his ancestors, and then the collateral relations were admitted to succeed even *in infinitum*, because they might have been of the blood of, that is, descended from, the first imaginary purchaser. For since it is not ascertained in such general grants, whether this feud shall be held *ut feudum paternum* or *feudum avitum*, but *ut feudum antiquum* merely; as a feud of indefinite antiquity: that is, since it is not ascertained from which of the ancestors of the grantee this feud shall be supposed to have descended; the law will not ascertain it, but will suppose any of his ancestors, *pro re nata*, to have been the first purchaser: and therefore it admits any of his collateral kindred (who have the other necessary requisites) to the inheritance, because every collateral kinsman must be descended from some one of his lineal ancestors.

"Of this nature are all the grants of fee-simple estates of this kingdom; for there is now in the law of England no such thing as a grant of a *feudum novum*, to be held *ut novum*: unless in the case of a fee-tail, and there we see that this rule is strictly observed, and none but the lineal descendants of the first donee (or purchaser) are admitted; but every grant of lands in fee-simple is with us a *feudum novum* to be held *ut antiquum*, as a feud whose antiquity is indefinite: and therefore the collateral kindred of the grantee, or descendants from any of his lineal ancestors, by whom the lands might have possibly been purchased, are capable of being called to the inheritance." 2 Bl. Com. 221, 222.

SECTION II.

FEE-TAIL.

Co. Lit. 19 *a*. Before which statute of *Donis conditionalibus*, if land had been given to a man, and to the heirs males of his body, the having of an issue female had been no performance of the condition; but if he had issue male, and died, and the issue male had inherited, yet he had not had a fee simple absolute; for if he had died without issue male, the donor should have entered as in his reverter. By having of issue, the condition was performed for three purposes: First, to alien; Secondly, to forfeit; Thirdly, to charge with rent, common, or the like. But the course of descent was not altered by having issue: for if the donee had issue and died, and the land had descended to his issue, yet if that issue had died (without any alienation made) without issue, his collateral heir should not have inherited, because he was not within the form of the gift, viz., heir of the body of the donee. Lands were given before the statute in frank-marriage, and the donees had issue and died, and after the issue died without issue; it was adjudged, that his collateral issue shall not inherit, but the donor shall re-enter. So note, that the heir in tail had no fee simple absolute at the common law, though there were divers descents.

If lands had been given to a man and to his heirs males of his body, and he had issue two sons, and the eldest had issue a daughter, the daughter was not inheritable to the fee simple, but the younger son *per formam doni*. And so if land had been given at the common law to a man and the heirs females of his body, and he had issue a son and a daughter, and died, the daughter should have inherited this fee simple at the common law; for the statute of *Donis conditionalibus* createth no estate tail, but of such an estate as was fee simple at the common law, and is descendible in such form as it was at the common law. If the donee in tail had issue before the statute, and the issue had died without issue, the alienation of the donee at the common law, having no issue at that time, had not barred the donor.

If donee in tail at the common law had aliened before any issue had, and after had issue, this alienation had barred the issue, because he claimed a fee simple; yet if that issue had died without issue, the donor might re-enter, for that he aliened before any issue, at what time he had no power to alien to bar the possibility of the donor.¹

LEAKE, DIGEST LAND LAW, 35. At the common law all inheritances were fee simple in respect of the rights and powers of the tenant. In

¹ See *Anonymous*, Fitz. Ab. Formedon, 65; *Barksdale v. Gamage*, 3 Rich. Eq. 271. — Ed.

respect of duration, they might be absolute or conditional, that is, determinable by some conditional limitation.

A fee limited to a person and "to the heirs of his body" or "to the heirs male of his body" or in other form of restricted inheritance was a fee simple conditional at common law. It was determinable by failure of the line of issue designated to succeed, and the land reverted in possession to the grantor or his heirs. But the restriction upon the duration of the fee did not, at common law, otherwise affect the rights and powers of the tenant; and in respect of these it remained a fee simple. So long as the fee lasted the tenant for the time being had all such powers, including the power of alienation, as were the inseparable incidents of an estate of inheritance. Only it was adjudged to be a necessary condition of the full effect of his alienation, so as to bar not only his issue, but also the possibility of reverting to the grantor, that he should have heritable issue: — "the gift to one and to the heirs of his body was construed, for the purpose of alienation, to be the same as a gift to him and to his heirs, if he had heirs of his body."

Other ancient instances are cited of fees simple conditional, as: — a fee limited to A. and to his heirs for so long as the church of St. Paul shall stand; — to A. and to his heirs, tenants of the manor of Dale; — to A. and to his heirs, so long as A. or B. has heirs of his body.¹

ST. 13 EDW. I.; ST. OF WESTM. II. (1285) c. 1; DE DONIS CONDITIO-
NALIBUS. First, concerning lands that many times are given upon condition, that is, to wit, where any giveth his land to any man and his wife, and to the heirs begotten of the bodies of the same man and his wife, with such condition expressed that if the same man and his wife die without heir of their bodies between them begotten, the land so given shall revert to the giver or his heir; in case also where one giveth lands in free marriage, which gift hath a condition annexed, though it be not expressed in the deed of gift, which is this, that if the husband and wife die without heir of their bodies begotten, the land so given shall revert to the giver or his heir; in case also where one giveth land to another and the heirs of his body issuing, it seemed very hard and yet seemeth to the givers and their heirs, that their will being expressed in the gift was not heretofore nor yet is observed. In all the cases aforesaid after issue begotten and born between them, to whom the lands were given under such condition, heretofore such feoffees had power to aliene the land so given, and to disinherit their issue of the land, contrary to the minds of the givers, and contrary to the form expressed in the gift: and further, when the issue of such feoffee is failing, the land so given ought to return to the giver or his heir by form of gift expressed in the deed, though the issue, if any were, had died; yet by the deed and feoffment of them, to whom land was so given upon condition, the donors have heretofore been barred of their reversion of the same tenements which was directly repugnant to the form

¹ See 2 P. & M. Hist. (2d ed.) 17-19. — Ed.

of the gift: wherefore our lord the king, perceiving how necessary and expedient it should be to provide remedy in the aforesaid cases, hath ordained, that the will of the giver according to the form in the deed of gift manifestly expressed shall be from henceforth observed, so that they to whom the land was given under such condition shall have no power to aliene the land so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver or his heirs if issue fail, either by reason that there is no issue at all, or if any issue be, it fail by death, the heir of such issue failing. Neither shall the second husband of any such woman from henceforth have anything in the land so given upon condition after the death of his wife, by the law of England,¹ nor the issue of the second husband and wife shall succeed in the inheritance, but immediately after the death of the husband and wife, to whom the land was so given, it shall come to their issue or return unto the giver or his heir as before is said. And forasmuch as in a new case new remedy must be provided, this manner of writ shall be granted to the party that will purchase it: "*Command A. that justly, &c., he render to B. the manor of F. with its appurtenances, which C. gave to such a man, and such a woman, and to the heirs of the said man and woman issuing;*" or, "*which C. gave to such a man in free marriage with such a woman, and which, after the death of the aforesaid man and woman, to the aforesaid B., son of the aforesaid man and woman, ought to descend, by the form of the gift aforesaid, as he saith;*" or, "*which C. gave to such a one and the heirs of his body issuing, and which after the death of the said such a one, to the aforesaid B., son of the aforesaid such a one, ought to descend, by the form, &c.*" The writ whereby the giver shall recover when issue faileth is common enough in the Chancery. And it is to wit that this statute shall hold place touching alienation of land contrary to the form of gift hereafter to be made, and shall not extend to gifts made before. And if a fine be levied hereafter upon such lands it shall be void in the law, neither shall the heirs or such as the reversion belongeth unto, though they be of full age, within England, and out of prison, need to make their claim.

LIT. §§ 13-19, 21-24. Tenant in fee tail is by force of the statute of W[estm]. II. c. 1, for before the said statute all inheritances were fee simple; for all the gifts which be specified in that statute were fee simple conditional at the common law, as appeareth by the rehearsal of the same statute. And now by this statute tenant in tail is in two manners, — that is to say, tenant in tail general, and tenant in tail special.

Tenant in tail general is, where lands or tenements are given to a man and to his heirs of his body begotten. In this case it is said general tail, because whatsoever woman that such tenant taketh to wife (if he hath many wives, and by every of them hath issue), yet every one of these issues by possibility may inherit the tenements by force of the gift; because that every such issue is of his body engendered.

¹ See *Anonymous*, Fitz. Ab. Formedon, 66; 2 P. & M. Hist. (2d ed.) 29. — ED.

In the same manner it is where lands or tenements are given to a woman and to the heirs of her body; albeit that she hath divers husbands, yet the issue which she may have by every husband may inherit as issue in tail by force of this gift; and therefore such gifts are called general tails.

Tenant in tail special is, where lands or tenements are given to a man and to his wife and to the heirs of their two bodies begotten. In this case none shall inherit by force of this gift but those that be engendered between them two. And it is called especial tail, because if the wife die, and he taketh another wife and have issue, the issue of the second wife shall not inherit by force of this gift, nor also the issue of the second husband, if the first husband die.

In the same manner it is where tenements are given by one man to another with a wife (which is the daughter or cousin to the giver) in frankmarriage, the which gift hath an inheritance by these words (frankmarriage) annexed unto it, although it be not expressly said or rehearsed in the gift, — that is to say, that the donees shall have the tenements to them and to the heirs between them two begotten. And this is called especial tail, because the issue of the second wife may not inherit.

And note, that this word (*Talliare*) is the same as to set to some certainty or to limit to some certain inheritance. And for that it is limited and put in certain what issue shall inherit by force of such gifts, and how long the inheritance shall endure, it is called in Latin *feodum talliatum*; i. e., *hæreditas in quandam certitudinem limitata*. For if tenant in general tail dieth without issue, the donor or his heirs may enter as in their reversion.

In the same manner it is of the tenant in especial tail, &c. For in every gift in tail without more saying the reversion of the fee simple is in the donor.¹ And the donees and their issue shall do to the donor and to his heirs the like services as the donor doth to his lord next paramount, except the donees in frankmarriage, who shall hold quietly from all manner of service (unless it be for fealty) until the fourth degree is past, and after the fourth degree is past, the issue in the fifth degree, and so forth the other issues after him, shall hold of the donor or of his heirs as they hold over, as before is said.

And all these entails aforesaid be specified in the said statute of W[estm]. II. Also there be divers other estates in tail, though they be not by express words specified in the said statute, but they are taken by the equity of the same statute. As if lands be given to a man and to his heirs males of his body begotten; in this case his issue male shall

¹ "Inasmuch as the estate of tenant in tail was, according to the metaphysical expression of the lawyers, 'carved out of,' that is, less than an estate in fee simple and different from it, it followed that if tenant in fee simple made a gift in tail, such a gift was not within the Statute of *Quia Emptores*, but a tenure was created between tenant in tail and tenant in fee simple, the former holding of the latter." Digby, *Hist. R. P.* (2d ed.) 248. And see Williams, *R. P.* (18th ed.) 106.

inherit, and the issue female shall never inherit, and yet in the other entails aforesaid it is otherwise.

In the same manner it is if lands or tenements be given to a man and to his heirs females of his body begotten; in this case his issue female shall inherit by force and form of the said gift, and not his issue male. For in such cases of gifts in tail the will of the donor ought to be observed who ought to inherit and who not.

And in case where lands or tenements be given to a man and to the heirs males of his body, and he hath issue two sons, and dieth, and the eldest son enter as heir male, and hath issue a daughter, and dieth, his brother shall have the land, and not the daughter, for that the brother is heir male. But otherwise it is in the other entails which are specified in the said statute.

Also, if lands be given to a man and to the heirs males of his body, and he hath issue a daughter, who hath issue a son, and dieth, and after the donee die; in this case the son of the daughter shall not inherit by force of the entail; because whosoever shall inherit by force of a gift in tail made to the heirs males ought to convey his descent whole by the heirs males. Also in this case the donor may enter, for that the donee is dead without issue male in the law, insomuch as the issue of the daughter cannot convey to himself the descent by an heir male.

NOTE ON WARRANTY AND ON FINES AND RECOVERIES. The object of the *St. De Donis* was to prevent the alienation of entailed estates. The history of the mode in which this object was defeated is curious. (1) It was held that if any one whose heir a tenant in tail was had warranted the estate to a stranger, such tenant was barred if assets had descended on him from the warrantor; and where the warranty had been given by one from whom the estate tail could not possibly have descended, as a younger brother, the tenant in tail was barred without assets. Warranty of this latter sort was called collateral warranty. See Rawle, *Cov.*, §§ 8-10; Digby, *Hist. R. P.* (4th ed.) 249. (2) The courts allowed a collusive suit to be brought by the one to whom a tenant in tail wished to convey the land; and a judgment in this suit, which was called a common recovery, barred not only the issue in tail, but also all reversioners and remainder-men, except the Crown. The validity of common recoveries to disentail land seems to have been first judicially recognized in *Taltarum's Case*, *Y. B. 12 Edw. IV.* 19 (1473). See Digby, 251; Williams, *R. P.* (18th ed.) 93 *et seq.* (3) The *Sts. of 4 Hen. VII.* (1490) c. 24, and 32 *Hen. VIII.* (1540) c. 36, gave the same general effect to fines, which were another and very ancient species of collusive suit, as had been given to common recoveries. A fine levied with proclamations, in accordance with the provisions of those statutes, bound immediately all persons claiming under the cognizor, as the person levying the fine was called, and bound, unless claim was made within five years, all other persons except the Crown.

Simpler methods of docking entails have been adopted in recent times. 3 & 4 *W. IV.* c. 74; Williams, 100. In most of the United States, estates tail have been either (a) abolished and turned into fees-simple; or (b) made a life-estate in the first donee with a remainder in fee-simple to the person to whom the estate would pass at common law on the death of the first donee; or (c) allowed to be good until docked by a conveyance in fee by a simple deed. See Stimson, *Am. Stat. Law*, § 1313.

NOTE. — For a fuller account of the operation of fines and recoveries, see 2 *Bl. Com.* 348 *et seq.*; and for the form of proceeding, see 2 *Bl. Com.*, Appendix.

DETERMINABLE AND BASE FEES. "Intendments should be guided by the rules of the law, and not by idle conceits, and to prove this further, 13 Hen. VII., 11 Hen. VII., 21 Hen. VI. fo. 37, it is held, and the law seems plain, that if land be given to one and his heirs so long as J. S. has heirs of his body, the donee has a fee and may alien it notwithstanding there be a condition that he shall not alien; and 11 lib. Assize, p. 8, a like case is put and held as above: and there if land be given to one and his heirs so long as J. S. or his heirs may enjoy the Manor of D., those words (so long) are utterly vain and idle, and do not abridge the estate . . . and yet it is to be admitted that one may have an estate in fee determinable, but never by the act and consent of the parties without any entry for condition broken or title defeasible; and to show briefly how this will be is now convenient, and it will be if the lord of a villein being tenant in tail enters on the land, &c., he and his heirs will enjoy the land so long as the villein has issue, and then his estate determines; so he who recovers rent against a tenant in tail, '*que ill teign in tail*' [out of what he holds in tail?]; or [suppose] that tenant in tail of land be attainted of treason, the king will have a fee of the land entailed determinable on death without issue, and has no greater estate; but these estates last mentioned are not made by the first creation of the estates but by matter coming afterwards by other means." Per ANDERSON, C. J., in *Christopher Corbet's Case*, 2 And. 134, 138, 139.

"Before the statute of *Quia emptores* (18 Edw. 1) an estate might have been granted to A. B. and his heirs, so long as C. D. and his issue should live, or so long as C. D. and his heirs should be tenants of the manor of Dale; and upon C. D.'s ceasing to have issue, or to be tenant of the manor of Dale, the estate reverted to the donor, not as a condition broken, of which the donor, or his heir, might take advantage by entry, but as a principle of tenure, in the nature of an *escheat* upon the death of a tenant in fee-simple without heirs general. But the statute of *Quia emptores* destroys the immediate tenure between the donor and donee, in cases where the fee is granted; and consequently there can now be no reverter, or any estate or possibility of a reversion remaining in the donor after an estate in fee granted by him. This conclusion directly follows from the doctrine of tenures, and the effect of the statute of *Quia emptores* upon that doctrine. The proposition does not require the aid of decided cases; but the passage in 2 And. 138, contains an accurate exposition of the law upon this subject: 'If land be given to A. and his heirs, so long as J. S. has heirs of his body, the donee has fee, and may alien it. 13 Hen. 7; 11 Hen. 7; 21 Hen. 6, fol. 37; and says the law seems to be plain in it; and cites 11 Ass. 8, where the s. c. is put and held as before; and that there if the land be given to one and his heirs, so long as J. S. and his heirs shall enjoy the manor of D., those words (so long) are entirely void and idle, and do not abridge the estate.'

"The references in this passage (with the exception of the 11 Ass. 8) are not in the report correctly stated; but they are discovered in 13 Hen. 7, Easter Term, fol. 24; 11 Hen. 7, pl. 25; 21 Hen. 6, Hil. pl. 21. It will be proper to refer to the case first mentioned; premising, that, by the common law, where an absolute estate in fee simple was granted, no restraint could be placed on the alienation of it; inasmuch as such restraint would be repugnant to the grant itself. Upon a question in the case referred to, whether a condition restraining alienation upon the grant of an estate tail since the statute *De donis* was valid, Vavisor thought it valid; but added, that he agreed that such condition imposed on a feoffee in fee simple, so long as J. S. has issue, was void." 1 Sand. Uses (5th ed.) 208-210. See Gray, *Perpetuities*, §§ 31-41.

"A fine by barring the issue in tail only, and not the estates subsequently limited, conveyed what was called a *base fee*, an estate of the quality of a fee simple and descendible to the heirs general of the grantee, but determinable by failure of the issue in tail, upon which event the subsequent limitations took effect." Leake, 40. And see Challis, R. P. (2d ed.) 297 *et seq.*

SECTION III.

ESTATES FOR LIFE.

LIT. §§ 32, 33, 34, 35. Tenant in fee tail after possibility of issue extinct is, where tenements are given to a man and to his wife in especial tail, if one of them die without issue, the survivor is tenant in tail after possibility of issue extinct. And if they have issue, and the one die, albeit that during the life of the issue, the survivor shall not be said tenant in tail after possibility of issue extinct; yet if the issue die without issue, so as there be not any issue alive which may inherit by force of the tail, then the surviving party of the donees is tenant in tail after possibility of issue extinct.

Also, if tenements be given to a man and to his heirs which he shall beget on the body of his wife, in this case the wife hath nothing in the tenements, and the husband is seised as donee in especial tail. And in this case, if the wife die without issue of her body begotten by her husband, then the husband is tenant in tail after possibility of issue extinct.

And note, that none can be tenant in tail after possibility of issue extinct, but one of the donees, or the donee in especial tail. For the donee in general tail cannot be said to be tenant in tail after possibility of issue extinct; because always during his life, he may by possibility have issue which may inherit by force of the same entail. And so in the same manner the issue, which is heir to the donees in especial tail, cannot be tenant in tail after possibility of issue extinct, for the reason abovesaid.

And note, that tenant in tail after possibility of issue extinct shall not be punished of waste, for the inheritance that once was in him, 10 H. 6, 1. But he in the reversion may enter if he alien in fee, 45 E. 3, 22.

Tenant by the curtesy of England is, where a man taketh a wife seised in fee simple or in fee tail general, or seised as heir in tail especial, and hath issue by the same wife male or female born alive, albeit after the issue dieth or liveth, yet if the wife dies, the husband shall hold the land during his life by the law of England. And he is called tenant by the curtesy of England, because this is used in no other realm but in England only.

And some have said, that he shall not be tenant by the curtesy unless the child, which he hath by his wife, be heard cry; for by the cry it is proved, that the child was born alive. Therefore *Quære*.

Co. LIT. 29 b. If lands be given to a woman and to the heirs males of her body, she taketh a husband, and hath issue a daughter, and dieth, he shall not be tenant by the curtesy; because the daughter by no possibility could inherit the mother's estate in the land; and there-

fore where *Littleton* saith, issue by his wife male or female, it is to be understood, which by possibility may inherit as heir to her mother of such estate.

Co. Litt. 30 a. Four things do belong to an estate of tenancy by the curtesy, viz. marriage, seisin of the wife, issue, and death of the wife. But it is not requisite that these should concur together all at one time. And therefore, if a man taketh a woman seised of lands in fee, and is disseised, and then have issue, and the wife die, he shall enter and hold by the curtesy. So if he hath issue which dieth before the descent, as is aforesaid.

Litt. § 36. Tenant in dower is, where a man is seised of certain lands or tenements in fee simple, fee tail general, or as heir in special tail, and taketh a wife, and dieth, the wife after the decease of her husband shall be endowed of the third part of such lands and tenements as were her husband's at any time during the coverture, to have and to hold to the same wife in severalty by metes and bounds for term of her life, whether she hath issue by her husband or no, and of what age soever the wife be, so as she be past the age of nine years at the time of the death of her husband [for she must be above nine years old at the time of the decease of her husband], otherwise she shall not be endowed.

Litt. § 53. And also, in every case where a woman taketh a husband seised of such an estate in tenements, &c., so as by possibility it may happen that the wife may have issue by her husband, and that the same issue may by possibility inherit the same tenements of such an estate as the husband hath, as heir to the husband, of such tenements she shall have her dower, and otherwise not. For if tenements be given to a man, and to the heirs which he shall beget of the body of his wife, in this case the wife hath nothing in the tenements, and the husband hath an estate but as donee in special tail. Yet if the husband die without issue, the same wife shall be endowed of the same tenements; because the issue, which she by possibility might have had by the same husband, might have inherited the same tenements. But if the wife dieth, living her husband, and after the husband takes another wife, and dieth, his second wife shall not be endowed in this case, for the reason aforesaid.

Litt. § 56. Tenant for term of life is, where a man letteth lands or tenements to another for term of the life of the lessee, or for term of the life of another man. In this case the lessee is tenant for term of life. But by common speech he which holdeth for term of his own life, is called tenant for term of his life, and he which holdeth for term of another's life, is called tenant for term of another man's life (*tenant pur terme d'auter vie*).¹

Litt. § 57. And it is to be understood, that there is feoffor and feoffee, donor and donee, lessor and lessee. Feoffor is properly where a man enfeoffs another in any lands or tenements in fee simple, he which maketh the feoffment is called the feoffor, and he to whom the feoff-

¹ See Williams, R. P. (18th ed.) 131.

ment is made is called the feoffee. And the donor is properly where a man giveth certain lands or tenements to another in tail, he which maketh the gift is called the donor, and he to whom the gift is made is called the donee. And the lessor is properly where a man letteth to another lands or tenements for term of life, or for term of years, or to hold at will, he which maketh the lease is called lessor, and he to whom the lease is made is called lessee. And every one which hath an estate in any lands or tenements for term of his own or another man's life, is called tenant of freehold, and none other of a lesser estate can have a freehold: but they of a greater estate have a freehold; for he in fee simple hath a freehold, and tenant in tail hath a freehold, &c.

SECTION IV.

ESTATES LESS THAN FREEHOLD.

LIT. § 58. Tenant for term of years is where a man letteth lands or tenements to another for term of certain years, after the number of years that is accorded between the lessor and the lessee. And when the lessee entereth by force of the lease, then is he tenant for term of years; and if the lessor in such case reserve to him a yearly rent upon such lease, he may choose for to distrain for the rent in the tenements letten, or else he may have an action of debt for the arrearages against the lessee.

Co. LIT. 46 b. And true it is, that to many purposes he is not tenant for years until he enter: as a release made to him is not good to him to increase his estate, before entry; but he may release the rent reserved before entry, in respect of the privity. Neither can the lessor grant away the reversion by the name of reversion, before entry. But the lessee before entry hath an interest, *interesse termini*, grantable to another. And albeit the lessor die before the lessee enters, yet the lessee may enter into the lands, as our author himself holdeth in this chapter. And so if the lessee dieth before he entered, yet his executors or administrators may enter, because he presently by the lease hath an interest in him: and if it be made to two, and one die before entry, his interest shall survive.

LIT. § 68. Tenant at will is, where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called tenant at will, because he hath no certain nor sure estate, for the lessor may put him out at what time it pleaseth him.

Co. LIT. 57 b. There is a great diversity between a tenant at will and a tenant at sufferance; for tenant at will is always by right, and tenant at sufferance entereth by a lawful lease, and holdeth over

by wrong. A tenant at sufferance is he that at the first came in by lawful demise, and after his estate ended continueth in possession and wrongfully holdeth over. As tenant *pur terme d'auter vie* continueth in possession after the decease of *Ce' que vie*, or tenant for years holdeth over his term; the lessor cannot have an action of trespass before entry.

SECTION V.

JOINT OWNERSHIP.

Parceners. LIT. §§ 241, 242, 254, 265, 277, 280–282, 287, 291, 292, 294, 309, 319, 321. Parceners¹ are of two sorts, to wit; parceners according to the course of the common law, and parceners according to the custom. Parceners after the course of the common law are, where a man, or woman, seised of certain lands or tenements in fee simple or in tail, hath no issue but daughters, and dieth, and the tenements descend to the issues, and the daughters enter into the lands or tenements so descended to them, then they are called parceners, and be but one heir to their ancestor. And they are called parceners; because by the writ, which is called *breve de participatione facienda*, the law will constrain them, that partition shall be made among them. And if there be two daughters to whom the land descendeth, then they be called two parceners; and if there be three daughters, they be called three parceners; and four daughters, four parceners; and so forth.

Also, if a man seized of tenements in fee simple or in fee tail dieth without issue of his body begotten, and the tenements descend to his sisters, they are parceners, as is aforesaid. And in the same manner, where he hath no sisters, but the lands descend to his aunts, they are parceners, &c. But if a man hath but one daughter, she shall not be called parcener, but she is called daughter and heir, &c.

And note, that none are called parceners by the common law, but females or the heirs of females, which come to lands or tenements by descent; for if sisters purchase lands or tenements, of this they are called jointenants, and not parceners.

Parceners by the custom are, where a man seised in fee simple, or in fee tail of lands or tenements which are of the tenure called gavelkind within the county of Kent, and hath issue divers sons and die, such lands or tenements shall descend to all the sons by the custom, and they shall equally inherit and make partition by the custom, as females shall do, and a writ of partition lieth in this case as between females. But it behooveth in the declaration to make mention of the custom. Also such custom is in other places of England, and also such custom is in North Wales, &c.

¹ See 2 Bl. Com. 187 *et seq.*

Jointenants. Jointenants¹ are, as if a man be seised of certain lands or tenements, &c. and infeoffeth two, three, four, or more, to have and to hold to them for term of their lives, or for term of another's life, by force of which feoffment or lease they are seised, these are jointenants.

And it is to be understood, that the nature of jointenancy is, that he which surviveth shall have only the entire tenancy, according to such estate as he hath, if the jointure be continued, &c. As if three jointenants be in fee simple, and the one hath issue and dieth, yet they which survive shall have the whole tenements, and the issue shall have nothing. And if the second jointenant hath issue and die, yet the third which surviveth shall have the whole tenements to him and to his heirs for ever. But otherwise it is of parceners; for if three parceners be, and before any partition made the one hath issue and dieth, that which to him belongeth shall descend to his issue. And if such parcener die without issue, that which belongs to her shall descend to her co-heirs, so as they shall have this by descent, and not by survivor, as jointenants shall have, &c.

And as the survivor holds place between jointenants in the same manner it holdeth place between them which have joint estate or possession with another of a chattel, real or personal. As if a lease of lands or tenements be made to many for term of years, he, which survives of the lessees, shall have the tenements to him only during the term by force of the same lease. And if a horse, or any other chattel personal be given to many, he which surviveth shall have the horse only.

In the same manner it is of debts and duties, &c. for if an obligation be made to many for one debt, he which surviveth shall have the whole debt or duty. And so is it of other covenants and contracts, &c.

Also, if there be two jointenants of land in fee simple within a borough where lands and tenements are divisible by testament, and if the one of the said two jointenants deviseth that which to him belongeth by his testament, &c. and dieth, this devise is void. And the cause is, for that no devise can take effect till after the death of the devisor, and by his death all the land presently cometh by the law to his companion, which surviveth, by the survivor; the which he doth not claim, nor hath any thing in the land by the devisor, but in his own right by the survivor according to the course of law, &c. and for this cause such devise is void. But otherwise it is of parceners seised of tenements devisable in like case of devise, &c. *causa qua supra*.

Also, if a joint estate be made of land to a husband and wife and to a third person, in this case the husband and wife have in law in their right but the moiety.²

¹ See 2 Bl. Com. 180 *et seq.*

² Lord Coke does not use the phrase "by entireties." He speaks of cases in which "the husband and wife shall have no moieties." That is to say, he regards tenancy by entireties as being a species of joint tenancy, with the distinguishing characteristic that it confers no power of severance. Challis, Real Prop. (2d ed.) 344, note.

See 2 Kent, Com. (14th ed.) *132, note x. — Ed.

Tenants in common. Tenants in common are they, which have lands or tenements in fee simple, fee tail, or for term of life, &c. and they have such lands or tenements by several titles, and not by a joint title, and none of them know of this his several, but they ought by the law to occupy these lands or tenements in common, and *pro indiviso* to take the profits in common. And because they come to such lands or tenements by several titles, and not by one joint title, and their occupation and possession shall be by law between them in common, they are called tenants in common. As if a man infeoff two jointenants in fee, and the one of them alien that which to him belongeth to another in fee, now the alienee and the other jointenant are tenants in common; because they are in such tenements by several titles, for the alienee cometh to the moiety by the feoffment of one of the jointenants, and the other jointenant hath the other moiety by force of the first feoffment made to him and to his companion, &c. And so they are in by several titles, that is to say, by several feoffments, &c.

Also, if three jointenants be, and one of them alien that which to him belongeth to another man in fee, in this case the alienee is tenant in common with the other two jointenants: but yet the other two jointenants are seised of the two parts which remain jointly, and of these two parts the survivor between them two holdeth place, &c.

Also, if two parceners be, and the one alieneth that to her belongeth to another, then the other parcener and the alienee are tenants in common.

Also, as there be tenants in common of lands and tenements, &c. as aforesaid, in the same manner there be of chattels reals and personals. As if a lease be made of certain lands to two men for term of 20 yeares, and when they be of this possessed, the one of the lessees grant that which to him belongeth to another during the term, then he to whom the grant is made and the other shall hold and occupy in common.

In the same manner it is of chattels personals. As if two have jointly by gift or by buying a horse or an ox, &c. and the one grant that to him belongs of the same horse or ox to another, the grantee, and the other which did not grant, shall have and possess such chattels personals in common. And in such cases, where divers persons have chattels real or personal in common, and by divers titles, if the one of them dieth, the others which survive shall not have this as survivor, but the executors of him which dieth shall hold and occupy this with them which survive, as their testator did or ought to have done in his lifetime, &c. because that their titles and rights in this were several, &c.

NOTE. — For statutory changes in the United States, see Stimson, *Am. Stat. Law*, §§ 1371, 1375.

SECTION VI.

REVERSIONS AND REMAINDERS.¹

WILLIAMS, REAL PROPERTY (18th ed.), 308, 318. If a tenant in fee simple should grant to another person a lease for a term of years, or for life, or even if he should grant an estate tail, it is evident that he will not thereby dispose of all his interest; for in each case his grantee has a less estate than himself. Accordingly, on the expiration of the term of years, or on the decease of the tenant for life, or on the decease of the donee in tail without having barred his estate tail and without issue, the remaining interest of the tenant in fee will *revert* to himself or his heirs, and he or his heir will again become tenant in fee simple in possession. The smaller estate which he has so granted is called, during its continuance, the *particular estate*, being only a part, or *particula*, of the estate in fee. And, during the continuance of such particular estate, the interest of the tenant in fee simple, which still remains undisposed of — that is, his present estate, in virtue of which he is to have again the possession at some future time — is called his *reversion*.

If at the same time with the grant of the particular estate, he should also dispose of this remaining interest or reversion, or any part thereof, to some other person, it then changes its name, and is termed, not a reversion but a *remainder*. Thus, if a grant be made by A, a tenant in fee simple, to B for life, and after his decease to C and his heirs, the whole fee simple of A will be disposed of, and C's interest will be termed a remainder, expectant on the decease of B. A remainder, therefore, always has its origin in express grant: a reversion merely arises incidentally, in consequence of the grant of the particular estate. It is created simply by the law, whilst a remainder springs from the act of the parties.

A remainder chiefly differs from a reversion in this, — that between the owner of the particular estate and the owner of the remainder (called the remainderman) no tenure exists. They both derive their estates from the same source, the grant of the owner in fee simple; and one of them has no more right to be lord than the other. But as all the estates must be holden of some person, — in the case of a grant of a particular estate with a remainder in fee simple, — the particular tenant and the remainderman both hold their estates of the same chief lord as their grantor held before. It consequently follows, that no rent service is incident to a remainder, as it usually is to a reversion; for rent service is an incident of tenure, and in this case no tenure exists.

¹ See 2 P. & M. Hist. 21.

LEAKE, DIGEST OF LAND LAW, 318, 320, 322, 326, 328. Several remainders may be created successively in the same land, either leaving a reversion or with an ultimate remainder in fee. If a grant be made to A for life, and after the lapse of a day after his death to B for life or in fee, the limitation of B is not a remainder, because it does not commence in possession immediately on the termination of the particular estate; it is a limitation of a freehold estate to commence *in futuro*, which in a common law conveyance is void, and the reversion of A's estate remains in the grantor. Also a limitation which is to take effect in defeasance of a preceding estate, without waiting for the regular determination of that estate according to the terms of its limitation, is not a remainder; and such a limitation is void at common law.

The particular estate and the remainder must be created at the same time by one conveyance or instrument: for if the particular estate be first created, leaving the reversion in the grantor, any subsequent disposition can be effected only by grant or assignment of the reversion; which is not thereby changed into a remainder, but still retains its character of a reversion, to which the tenure of the particular estate is incident.

Tenant of a particular estate of freehold may, in general, convey the land for a less estate with remainder over.

But a remainder may be limited to a person not yet ascertained or to a certain person upon a condition precedent which may not happen until after the termination of the particular estate; and whilst such uncertainty lasts, as to the person or the interest, it is described as a *contingent* remainder. A contingent remainder becomes changed into a vested remainder by the owner becoming certain or the condition happening during the continuance of the particular estate.

The principle of the common law that the seisin of the freehold can never be in abeyance, but must always be vested in some determinate person imposes two rules upon the limitation and operation of contingent remainders: — The first of which rules is that a contingent remainder of freehold must always have a particular vested estate of freehold to support it.

The other rule resulting from the principle above stated is, — That a contingent remainder must become vested during the continuance of the particular estate or at the instant of its determination. If not then vested, it fails altogether, and the next limitation takes immediate effect.

CHAPTER III.

SEISIN AND CONVEYANCE.

SECTION I.

SEISIN.

Co. Lit. 17 a. *Seisitus* cometh of the French word *seisin*, i. e., *possessio*, saving that in the common law, *seised* or *seisin* is properly applied to freehold, and *possessed* or *possession* properly to goods and chattels; although sometime the one is used instead of the other.¹

LEAKE, DIGEST OF LAND LAW, 46-48. A feoffment might be made with an express appropriation of the seisin to a series of estates in the form of particular estate and remainders, and the livery to the immediate tenant was then effectual to transfer the seisin to or on behalf of all

¹ "*Seisin* is a technical term denoting the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass. It is a word common as well to the French as to the English law. It is either in deed, which is, when the person has the actual seisin or possession; or in law, when after a descent the person, on whom the lands descend, has not actually entered, and the possession continues vacant, not being usurped by another. When lands of inheritance are carved into different estates, the tenant of the freehold in possession, and the persons in remainder or reversion, are equally in the seisin of the fee. But, in opposition to what may be termed the *expectant* nature of the seisin of those in remainder or reversion, the tenant in possession is said to have the *actual* seisin of the lands. The fee is intrusted to him. By any act which amounts to a disaffirmance by him of the title of those in the reversion, he forfeits his estate, and any act of a stranger which disturbs his estate is a disturbance of the whole fee. Hargrave's note, 217.

"Doubtless, there is an etymological connection between 'seizing' and being 'seised,' but the nature of that connection is not very certain. If on the one hand 'seisin' is connected with 'to seize,' on the other hand it is connected with 'to sit' and 'to set;' — the man who is seised is the man who is sitting on land; when he was put in seisin he was set there and made to sit there. Thus seisin seems to have the same root as the German *Besitz* and the Latin *possessio*. To our medieval lawyers the word *seisina* suggested the very opposite of violence; it suggested peace and quiet. It did so to Coke. 'And so it was said as *possessio* is derived a *pos* et *sedeo*, because he who is in possession may sit down in rest and quiet; so *seisina* also is derived a *sedendo*, for till he hath seisin all is *labor et dolor et vexatio spiritus*; but when he has obtained seisin, he may *sedere et acquiescere*.'" 2 P. & M. Hist. (2d ed.) 30. See *ib.* bk. 2, c. 4, § 2.

the tenants in remainder, according to the estates limited.¹ But future estates could only be limited in the form of remainders, and any limitations operating to shift the seisin otherwise than as remainders expectant upon the determination of the preceding estate were void at common law. Thus, upon a feoffment, with livery of seisin, to A for life or in tail, and upon the determination of his estate to B, the future limitation takes effect as a remainder immediately expectant upon A's estate.² But upon a feoffment to A in fee or for life, and after one year to B in fee; — or to A in fee, and upon his marriage to B in fee; — or to A in fee or for life, and upon B paying A a sum of money to B in fee, — the limitations shifting the seisin from A to B at the times and in the events specified, as they could not take effect as remainders, were wholly void at common law. Plowden, 29; 1 Hayes Conv. 19–21. Such limitations became possible in dealing with uses and in dispositions by will, as will appear hereafter.

The exigencies of tenure required that the seisin or immediate freehold should never be in abeyance, but that there should at all times be a tenant invested with the seisin ready, on the one hand, to meet the claims of the lord for the duties and services of the tenure, and, on the other hand, to meet adverse claims to the seisin, and to preserve it for the successors in the title. Co. Lit. 342 b; Butler's note, *Ib.*; see 1 Hayes Conv. (5th ed.) 12, 14.

This rule had important effects upon the creation of freehold estates; for it followed as an immediate consequence of the rule, as also from the nature of the essential act of conveyance by livery of seisin, that a grant of the freehold could not be made to commence at a future time, leaving the tenancy vacant during the interval. "Livery of seisin must pass a present freehold to some person and cannot give a freehold *in futuro*." — "If a man makes a lease for life to begin at Michaelmas it is void, for he cannot make present livery to a future estate, and therefore in such case nothing passes."³ Co. Lit. 217 a; 5 Co. 94 b, *Barwick's Case*.

As a consequence of the same rule if a feoffment were made to A for

¹ When a number of successive vested estates of freehold are derived out of the same original estate, the tenants of all such estates, though only one estate can at one time be vested in possession, are all said to be *in the seisin of the fee*. The first in order of the estates, which is vested in possession as well as in interest, is said to confer the right to the *actual seisin* or *immediate freehold*. Challis, Real Prop. (2d ed.) 89. — Ed.

² "The remainder is good and passeth out of the donor by the livery of seisin; for the particular estate and remainder, to many intents and purposes, make but one estate in judgment of law." Co. Lit. 143 a. See 1 Hayes, Conv. 21.

³ It may here be observed that leases and limitations of terms of years, which deal with the possession only and not with the freehold interest, may be made to commence at a future time, giving merely an *interesse termini* or right to have the possession when the time arrives, but no estate in the land. Leake, 314. — Ed.

In the United States freehold estates may often be created *in futuro* either by express statutory provisions or by inference from statutes dispensing with livery of seisin. See Gray, Perpetuities, §§ 67, 68.

life and after his death and one day after to B for life or in fee, the limitation to B was void, because it would leave the freehold without a tenant or in abeyance for a day after the death of A.¹

The seisin or freehold in remainder might be in abeyance during the continuance of the particular estate; for the present seisin of the tenant of that estate was sufficient to satisfy all the requirements of tenure, and it represented and supported all the future estates and interests in the fee.

Accordingly a remainder might be limited to take effect upon a condition, or in a person not ascertained, as an unborn child, so as to be in abeyance or uncertainty until the condition happened or the person became ascertained.² Such a limitation was good and might remain in uncertainty so long as the particular estate continued, as it was supported by the seisin of that estate. But it was essential that it should have become certain and absolute at the time when the particular estate determined; and if not then ascertained, so as to be capable of taking up the seisin, it failed altogether, and the next estate in remainder took immediate effect.

A remainder limited to an uncertain person or upon an uncertain condition, and so long as the uncertainty lasted, became known as a *contingent* remainder. A remainder limited absolutely and to a determinate person, or which had become absolute and certain in ownership by subsequent events was a *vested* remainder; the remainderman was presently *invested* with a portion of the seisin or freehold.

CHALLIS, REAL PROP. (2d ed.) 89-90. The seisin is quite independent of, and unaffected by, the existence of any term or terms of years. Therefore, so far as the seisin is concerned, there can exist no such thing as a remainder of freehold *expectant upon* a term of years. The existence of a prior term of years does not prevent the first vested estate of freehold from being an estate of freehold in possession. . . . During the continuance of a prior term, the first estate of freehold is properly described, not as being a *remainder of freehold expectant upon* the term of years, but as being the *freehold in possession subject to* the term. But since the possession of the freeholder is in such a case subject to the rights of the termor, and since these rights may, and in

¹ Plowden, 25; Fearn C. R. 307. "Since the tenancy was not allowed to be vacant or in suspense for an instant, it was essential to the validity of every conveyance of the freehold that it should be made to take immediate effect. On the same principle, it was essential that all substitutions should be so strictly consecutive as not to leave the feud unprovided with a tenant even for an instant." 1 Hayes, Conv. 16.

² See Williams, Real Prop. (18th ed.) 333, 334. "Also, if a parson of a church dieth, now the freehold of the glebe of the parsonage is in none during the time that the parsonage is void, but in abeyance, viz. in consideration and in the understanding of the law, until another be made parson of the same church; and immediately when another is made parson, the freehold in deed is in him as successor." Lit. § 647.

practice usually do, deprive the freeholder of the immediate use and occupation of the lands during the term, the result is, for many practical purposes, much the same as if the freehold subsisted only as a veritable remainder. In this sense the word *remainder* is often applied to estates of freehold limited after a term of years. But when this language is used, the reader must bear in mind (1) that a prior term of years does not prevent a subsequent vested estate of freehold from being an estate of freehold *in possession*; and (2) that a prior term of years does not prevent a subsequent contingent estate of freehold from being void in its inception, as being an attempt to create a freehold *in futuro*.

LEAKE, 49-50. If a lease were made for years with a contingent remainder of freehold, the limitation in remainder was wholly void, because it left the seisin in abeyance until the happening of the contingency; nor could livery be given for such an estate for want of a present certain grantee of the freehold. Thus, "it is a general rule, that wherever an estate in contingent remainder amounts to a freehold, some vested estate of freehold must precede it." FEARNE, C. R. 281.

LIT. § 448. Freehold in law is, if a man disseiseth another, and dieth seised, whereby the tenements descend to his son, albeit that his son doth not enter into the tenements, yet he hath a freehold in law, which by force of the descent is cast upon him, and therefore a release made to him, so being seised of a freehold in law, is good enough; and if he taketh wife being so seised in law, although he never enter in deed, and dieth, his wife shall be endowed.

NOTE.—DESCENT AND PURCHASE. Lit. § 12. Also, purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he cometh not by title of descent from any of his ancestors, or of his cousins, but by his own deed.

Co. Lit. 18 b. A purchase is always intended by title, and most properly by some kind of conveyance, either for money or some other consideration, or freely of gift; for that is in law also a purchase. But a descent, because it cometh merely by act of law, is not said to be a purchase; and accordingly the makers of the Act of Parliament in 1 H. 5, c. 5, speak of them that have lands or tenements by purchase or descent of inheritance. And so it is of an escheat [see Hargrave's note *ad loc.* — Ed.] or the like, because the inheritance is cast upon, or a title vested in the lord by act in law, and not by his own deed or agreement, as our author here saith. Like law of the state of tenant by the curtesy, tenant in dower, or the like. But such as attain to lands by mere injury or wrong, as by disseisin, intrusion, abatement, usurpation, &c. cannot be said to come in by purchase, no more than robbery, burglary, piracy, or the like, can justly be termed purchase.

SECTION II.

LIVERY OF SEISIN.

LIT. § 59. And it is to be understood, that in a lease for years, by deed or without deed, there needs no livery of seisin to be made to the lessee, but he may enter when he will by force of the same lease. But of feoffments made in the country, or gifts in tail, or lease for term of life; in such cases where a freehold shall pass, if it be by deed or without deed, it behooveth to have livery of seisin.

Co. LIT. 48 a, b. And there be two kinds of livery of seisin, viz. a livery in deed, and a livery in law. A livery in deed is when the feoffor taketh the ring of the door, or turf or twig of the land, and delivereth the same upon the land to the feoffee in name of seisin of the land, &c. *per hostium et per haspam et annulum vel per fustem vel baculum, &c.*

A livery in law is, when the feoffor saith to the feoffee, being in the view of the house or land, "I give you yonder land to you and your heirs, and go, enter into the same, and take possession thereof accordingly," and the feoffee doth accordingly in the life of the feoffor enter, this is a good feoffment, for *signatio pro traditione habetur*. And herewith agreeth Bracton: *Item dici poterit et assignari, quando res vendita vel donata sit in conspectu, quam venditor et donator dicit se tradere*: and in another place he saith, *in seisinā per effectum et per aspectum*. But if either feoffor or the feoffee die before entry the livery is void. And livery within the view is good where there is no deed of feoffment. And such a livery is good albeit the land lie in another county. A man may have an inheritance in an upper chamber, though the lower buildings and soil be in another, and seeing it is an inheritance corporeal it shall pass by livery.

LIT. § 60. But if a man letteth lands or tenements by deed or without deed for term of years, the remainder over to another for life, or in tail, or in fee; in this case it behooveth, that the lessor maketh livery of seisin to the lessee for years, otherwise nothing passeth to them in the remainder, although that the lessee enter into the tenements. And if the termor in this case entereth before any livery of seisin made to him, then is the freehold and also the reversion in the lessor. But if he maketh livery of seisin to the lessee, then is the freehold together with the fee to them in the remainder, according to the form of the grant and the will of the lessor.

SECTION III.

GRANT AND ATTORNMENT.

Co. Lit. 172 a. "*Grant*," *Concessio*, is in the common law a conveyance of a thing that lies in grant and not in livery, which cannot pass without deed; as advowsons, services, rents, commons, reversions, and such like.¹

WILLIAMS, REAL PROPERTY (18th ed.), 309. If the tenant in fee simple should have made a lease for life, he must have parted with his seisin to the tenant for life; for an estate for life is an estate of freehold, and such tenant for life will, therefore, during his life, continue to be the freeholder, or holder of the feudal seisin. No feoffment can consequently be made by the tenant in fee simple; for he has no seisin of which to make livery. His reversion is but a fragment of his old estate, and remains purely incorporeal, until, by the dropping of the life of the grantee, it shall again become an estate in possession. Till then, that is, so long as it remains a reversion expectant on an estate of freehold, it can only be conveyed, like all other incorporeal hereditaments when apart from what is corporeal, by a deed of grant.

LIT. § 551. Attornment is, as if there be lord and tenant, and the lord will grant by his deed the services of his tenant to another for

¹ "The division of hereditaments into corporeal and incorporeal, though deeply rooted in our legal phraseology, is most unfortunate and misleading. The confusion is inherited from the Roman lawyers (see Justinian, Inst. ii. tit. 2), but has been made worse confounded by our own authorities. The Romans, misled by the double sense of *res*, unhappily distinguished *res corporales* and *res incorporales*, the former being things *quæ tangi possunt, veluti aurum, vestis*, the latter mere rights, *quæ in jure consistunt*. It is obvious that this is mere confusion, the two ideas not being *in pari materia*, or capable of being brought under one class, or of forming opposite members of a division. Following the Romans, our lawyers distinguished between hereditaments as meaning the actual corporeal land itself, and another kind of hereditaments as not being the land itself, but 'the rights annexed to or issuing out of the land.' A moment's reflection is sufficient to show that the distinction is untenable. The lawyer has nothing whatever to do with the material corporeal land, except so far as it is the subject of rights. It is the distinction between different classes of rights, and not between land on the one side and rights on the other, that he is concerned with. In such phrases as 'the land descends to the heir,' what is meant is, not that something happens to the land itself, but that a particular class of the ancestor's rights in relation to the land descends to the heir. The names 'corporeal and incorporeal' are most unfortunate, because if by 'corporeal' is meant 'relating to land,' then a large class of incorporeal hereditaments are also entitled to the name; if by 'incorporeal' is meant that they are mere rights, then all hereditaments are incorporeal, because the lawyer is only concerned with different classes of rights. In reality, however, it appears that the names point to different classes of rights; and in fact, Stephen in his edition of Blackstone, 5th ed., vol. i. p. 656, almost confines incorporeal hereditaments to *jura in alieno solo*. See Austin, vol. ii. pp. 707, 708." Digby, Hist. Real Prop., App. to Part I. (11) note.

term of years, or for term of life, or in tail, or in fee, the tenant must attorn to the grantee in the life of the grantor, by force and virtue of the grant, or otherwise the grant is void. An attornment is no other in effect, but when the tenant hath heard of the grant made by his lord, that the same tenant do agree by word to the said grant, as to say to the grantee, I agree to the grant made to you, &c. or I am well content with the grant made to you; but the most common attornment is, to say, Sir, I attorn to you by force of the said grant, or I become your tenant, &c. or to deliver to the grantee a penny, or a halfpenny, or a farthing, by way of attornment.

Co. Litt. 309 a, b. "*The tenant must attorn to the grantee in the life of the grantor, &c.*" And so must he also in the life of the grantee: and this is understood of a grant by deed. And the reason hereof is, for that every grant must take effect as to the substance thereof in the life both of the grantor and the grantee. And in this case if the grantor dieth before attornment, the seignior, rent, reversion, or remainder descend to his heir; and therefore after his decease the attornment cometh too late: so likewise if the grantee dieth before attornment, an attornment to the heir is void, for nothing descended to him: and if he should take, he should take it as a purchaser, where the heirs were added but as words of limitation of the estate, and not to take as purchasers.

But if the grant were by fine, then albeit the conusor or conusee dieth, yet the grant is good. For by fine levied the state doth pass to the conusee and his heirs; and the attornment to the conusee or his heirs at any time to make privity to distrain is sufficient. But all this is to be taken as Littleton understood it, viz. of such grants as have their operation by the common law. For since Littleton wrote, if a fine be levied of a seignior, &c. to another to the use of a third person and his heirs, he and his heirs shall distrain without any attornment, because he is in by the Statute of 27 H. 8, cap. 10, by transferring of the state to the use, and so he is in by act in law.¹

And so it is, and for the same cause, if a man at this day by deed indented and enrolled according to the Statute, bargaineth and selleth a seignior, &c. to another, the seignior shall pass to him without any attornment; and so it is of a rent, a reversion, and a remainder. So as the law is much changed, and the ancient privilege of tenants, donees, and lessees much altered concerning attornments since Littleton wrote.

But if the conusee of a fine before any attornment by deed indented and enrolled, bargaineth and selleth the seignior to another, the bargainee shall not distrain, because the bargainor could not distrain. *Et sic de similibus*; for *nemo potest plus juris ad alium transferre quam ipse habet*. Vide Sect. 149, where upon a recovery, the recoverer shall distrain and avow without attornment.

¹ An attornment was not necessary where the reversion was transmitted by descent, escheat, or devise. 2 Shep. Touch. (Preston's ed.) 256, 257.

A grant to the king, or by the king to another, is good without attornment, by his prerogative.

LIT. §§ 567-569. Also, if a man letteth tenements for term of years, by force of which lease the lessee is seised, and after the lessor by his deed grant the reversion to another for term of life, or in tail, or in fee; it behooveth in such case that the tenant for years attorn, or otherwise nothing shall pass to such grantee by such deed. And if in this case the tenant for years attorn to the grantee, then the freehold shall presently pass to the grantee by such attornment without any livery of seisin, &c. because if any livery of seisin, &c. should be or were needful to be made, then the tenant for years should be at the time of the livery of seisin ousted of his possession, which should be against reason, &c.

Also, if tenements be letten to a man for term of life, or given in tail, saving the reversion, &c. if he in the reversion in such case grant the reversion to another by his deed, it behooveth that the tenant of the land attorn to the grantee in the life of the grantor, or otherwise the grant is void.

In the same manner is it, if land be granted in tail, or let to a man for term of life, the remainder to another in fee, if he in the remainder will grant this remainder to another, &c. if the tenant of the land attorn in the life of the grantor, then the grant of such a remainder is good or otherwise not.¹

ST. 4 ANNE (1705), c. 16, § 9. And be it further enacted by the authority aforesaid, That from and after the said first day of Trinity term [1706], all grants or conveyances thereafter to be made, by fine or otherwise, of any manors or rents, or of the reversion or remainder of any messuages or lands, shall be good and effectual, to all intents and purposes, without any attornment of the tenants of any such manors, or of the land out of which such rent shall be issuing, or of the particular tenants upon whose particular estates any such reversions or remainders shall and may be expectant or depending, as if their attornment had been had and made.²

¹ See Lit. §§ 579 *et seq.* "Sir Will. Cordall, Mr. of the Rols [1557-1581], denied to compell one to attorn here that was at liberty by the common law, in the *Case of Sir John Windham*.

"Chancellor Bromely likewise denied such compulsion generally, but where the party quarrelled with the particular tenant's estate or entereth into some part of the lands in demise, or hath covenanted for recompense for non-attornment, there he utterly denieth to enforce the attornment. Pasch. 21 Eliz. [1579] in *Case of Philips and Doctor Sandford*." Cary, 5.

Semble, contra in the early law. 1 P. & M. Hist. (2d ed.) 347, 348; 2 ib. 93.

² For similar statutes in the United States, see Stimson, Am. Stat. Law, § 2009.

"Formerly, in order to constitute a privity of estate between the purchaser of the reversion and the lessee, so as to enable the former to maintain an action of debt for rent, attornment was necessary. But by St. 4 Anne, c. 16, § 9, a grant of the reversion is good and effectual without attornment. *Moss v. Gallimore*, 1 Doug. 279. That statute having been passed long before the Revolution, and this provision being

SECTION IV.

RELEASE AND SURRENDER.

LIT. §§ 444, 445, 459, 460. Releases are in divers manners, viz. releases of all the right which a man hath in lands or tenements, and releases of actions personals and reals, and other things. Releases of all the right which men have in lands and tenements, &c. are commonly made in this form, or of this effect.

Know all men by these presents, that I, A. of B. have remisid, released, and altogether from me and my heirs quiet claimed: (me A. de B. remisisse, relaxasse, et omnino de me et hæredibus meis quietum clamasse): or thus, for me and my heirs quiet claimed to C. of D. all the right, title and claim (totum jus, titulum et clameum) which I have, or by any means may have, of and in one messuage with the appurtenances in F. &c. And it is to be understood, that these words, remisisse, et quietum clamasse, are of the same effect as these words, relaxasse.

Also, if a man letteth to another his land for term of years, if the lessor release to the lessee all his right, &c. before that the lessee had entered into the same land by force of the same lease, such release is void, for that the lessee had not possession in the land at the time of the release made, but only a right to have the same land by force of the lease. But if the lessee enter into the land, and hath possession of it by force of the said lease, then such release made to him by the feoffor, or by his heir, is sufficient to him by reason of the privity which by force of the lease is between them, &c.

In the same manner it is, as it seemeth, where a lease is made to a man to hold of the lessor at his will, by force of which lease the lessee hath possession: if the lessor in this case make a release to the lessee of all his right, &c. this release is good enough for the privity which is between them; for it shall be in vain to make an estate by a livery of seisin to another, where he hath possession of the same land by the lease of the same man before, &c.

Co. LIT. 337 b. "*Surrender*," *sursum redditio*, properly is a yielding up an estate for life or years to him that hath an immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement between them.

a rule in amendment of the common law, we may probably consider it in force here. *Commonwealth v. Leach*, 1 Mass. 61. But if otherwise, the rule itself is well established on the authority of long usage, and its adaptation to the more simple tenures, which were in use under our former government. *Farley v. Thompson*, 15 Mass. 25, 26." Per SHAW, C. J., in *Burden v. Thayer*, 3 Met. 76, 78.

SECTION V.

DEVISE.¹

LIT. § 167. Also, in some boroughs, by the custom, a man may devise by his testament his lands and tenements, which he hath in fee simple within the same borough at the time of his death; and by force of such devise, he to whom such devise is made, after the death of the devisor, may enter into the tenements so to him devised, to have and to hold to him, after the form and effect of the devise, without any livery of seisin thereof to be made to him, &c.²

SECTION VI.

DISSEISIN AND OTHER OUSTER, AND REMEDIES THEREFOR.

LEAKE, Part I. p. 56. *Disseisin* was a wrongful entry upon the land and *ouster* or dispossession of the freeholder. The seisin *de facto* thereby obtained had the same effect as a rightful seisin in conferring an apparent title to the land, and the means of alienation by livery. The disseisee retained a mere *right of entry*.

Disseisin of the tenant of a particular estate disseised or divested all the estates in remainder or reversion, and converted them into mere rights of entry, exercisable in their order of succession.

CHALLIS, REAL PROP. (2d ed.) 371-374. By the common law, any person having actual possession (not necessarily actual seisin) of lands, could, by a feoffment, give to any person, other than the person having the next or the immediate estate of freehold in the lands, an immediate estate of freehold, having any *quantum*. If the feoffor was actually seised, and the estate which passed by the feoffment was no greater than the estate of the feoffor, the feoffment took effect rightfully; but if the feoffor was not actually seised, or if the estate which passed by the feoffment was greater than his estate, the feoffment was styled a tortious feoffment, and was said to take effect by wrong.

In accordance with the maxim that *no one can qualify his own wrong*, a tortious feoffment divested the whole fee simple out of the rightful owner or owners. It does not follow that the tortious feoffment was necessarily a feoffment in fee simple; and it might in fact be for a less estate. In such a case, the feoffee took only the less estate, but the whole fee simple was divested out of the rightful owner

¹ See 2 P. & M. Hist., bk. 2, c. 6, § 3.

² On the general introduction of wills of land by statute, see *post*, 417.

or owners, and such part of it as was not disposed of by the feoffment became vested in the feoffor by way of a tortious reversion upon the tortious particular estate created by the feoffment.

The tortious operation of feoffments made after 1st October, 1845, is prevented by 8 & 9 Vict. c. 106, s. 4.

The possession of a termor for years, or tenant at will, or by sufferance, sufficed to enable the termor, or tenant, to make a tortious feoffment; and thus to convey an immediate estate or freehold which fulfilled many of the purposes of a rightful estate, though it afforded no defence against the title of the rightful owner. Upon the subject generally, and especially upon the case of *Doe v. Horde*, 1 Burr. 60, in which Lord Mansfield, striving after an unattainable equity, did his best to throw the law into confusion, see Butl. n. 1 on Co. Litt. 330 b.

If a tortious feoffment was made by any person other than a tenant in tail actually seised, the person rightfully entitled (or any other person acting in his name, even though without his assent) might at common law destroy the tortious estate of the feoffee by mere entry (Co. Litt. 258 a); but if the feoffee's heir had succeeded by inheritance before entry made, the heir's estate could not be affected by entry, and the rightful claimant was put to his action. (Litt. sect. 382.) His entry was technically said to be tolled by descent cast. Entry was tolled by a descent cast in fee tail (when the disseisor made a gift in tail) as well as in fee simple. (*Ibid.* sect. 386.) But on the extinction of the entail by failure of issue, the entry was revived against the remainderman or reversioner. (Co. Litt. 238 b.)

The 3 & 4 Will. 4, c. 27, s. 39, enacts that no descent cast after 31st December, 1833, shall toll any right of entry. This enactment made the learning of descents cast, and also of continual claim¹ whereby rights of entry might be protected therefrom, equally obsolete.

A feoffment, made by a tenant in tail actually seised, operated as a discontinuance of the estate tail, and divested all remainders, and the reversion, expectant upon it, unless they were vested in the king. (*Stone v. Newman*, Cro. Car. 427, at p. 428.) By such continuance the persons entitled under the entail, and in remainder or reversion, were barred of their right of entry, and respectively put to their action as the only means to enforce their claims.

The learning relating to discontinuance, though obsolete in respect to the common practice, is still sometimes of practical importance. In 1884 a case was litigated in the House of Lords in which the validity of a claim partly depended upon the properties at the common law of a tortious fee simple, which had been gained by a discontinuance effected in the preceding century, by a feoffment made by the survivor of two joint donees in special tail.

In all cases where the right of entry was tolled or barred, the needful action to recover the seisin was a real action. An action of ejectment (*ejectione firmæ*) would not suffice. (2 Prest. Abst. 328.)

¹ See Lit. §§ 414-443. — Ed.

There were two degrees of remoteness in a right of action, the first being said to be founded upon a *right of possession*, and the second being styled a *mere right*; and there were two kinds of real actions corresponding thereto, *possessory actions*, grounded upon writs styled *writs of entry*, and *droitural actions*, grounded upon writs styled *writs of right*. A right of possession might be turned to a mere right, either by suffering such a time to elapse as would be a bar to a writ of entry, or by suffering adverse judgment by default in an action on such writ. (See, on this subject, Butl. n. 1 on Co. Litt. 239 a.) But the discontinuance of an estate tail by the tortious feoffment of the tenant in tail in possession, forthwith turned the right of the issue in tail to a mere right, without passing through any intermediate stages.

The feoffment hitherto contemplated is a strictly common law conveyance. But uses capable of being executed by the statute may be declared upon the seisin of the feoffee; and in such case the conveyance takes effect partly by the common law and partly by the statute.

2 Co. Litt. 325 a, Butler's note. (1) I. *As to discontinuances in general*: In note 1, p. 239 a, it was observed, that in the case of a disseisin, while the possession remains in the disseisor, it is a mere naked possession, unsupported by any right; and that the disseisee may restore his possession, and put a total end to the possession of the disseisor, by an entry on the land, without any previous action; but that, if the disseisor dies, the heir comes to the possession of the estate by a lawful title. It was the same, by the old law, if the disseisor aliened; the alienee came in by a lawful title. By reason of this lawful title, the heir, in the first instance, and the alienee in the second, acquires a *presumptive right of possession*, which is so far good even against the person disseised, that he loses by it his right to recover the possession by entry, and can only recover it by an action at law. When the right of entry is thus lost, and the party can only recover by action, the possession is said to be *discontinued*. This is the *general* import of the word *discontinuance*; but, in its *usual* acceptation, it signifies the effect of alienations made by husbands seized *jure uxoris*; by ecclesiastics seized *jure ecclesiæ*; or by tenants in taile; those being the three instances adduced by Littleton of a discontinuance. But other cases, where the party having the right could not restore his possession by entry, and was therefore left to his remedy by action, were also, in Littleton's time, termed discontinuances. Thus, before the statute of the 11 H. 7, c. 20, the alienations of a woman seised of an estate in dower, or of an estate of the gift of her husband, or of any of his ancestors, were said to be a discontinuance; and before the statutes of 32 H. 8, c. 31, and 14 El. c. 8, recoveries suffered by tenants for life, or tenants by the courtesy, or tenants in tail after possibility of issue extinct, or even by the feoffee of tenant for years, worked a discontinuance. See *Sir William Pelham's Case*, 1 Rep. 14. It is to be observed, that there is a material difference between the situation or title of the alienee of any person whose alienation makes a discontinuance, and the situation

or title of the heir or alienee of a disseisor ; for the heir and alienee of a disseisor immediately claim under a person coming in by a wrongful title, and their estates, though not defeasible by entry, are immediately defeasible by action. But the alienee of every person, whose alienation is said to be a discontinuance, claims by a person having a lawful estate, and the estate of the alienee is unimpeachable during the life of the discontinuor.

A disseisin is a wrongful putting out of him that is actually seised of a freehold. And abatement is when a man died seised of an estate of an inheritance, and between the death and the entry of the heir, a stranger doth interpose himself, and abate.

Intrusion first properly is, when the ancestor died seised of any estate of inheritance expectant upon an estate for life, and then tenant for life dieth, and between the death and the entry of the heir a stranger doth interpose himself and intrude.

Secondly, he that entereth upon any of the king's demesnes, and taketh the profits, is said to intrude upon the king's possession.

Thirdly, when the heir in ward entereth at his full age without satisfaction for his marriage, the writ saith, *quod intrusit*.

Deforciammentum comprehendeth not only these aforementioned, but any man that holdeth land whereunto another man hath right, be it by descent or purchase, is said to be a deforceor.

Usurpation hath two significations in the common law : one, when a stranger that no right hath presenteth to a church, and his clerk is admitted and instituted, he is said to be an usurper, and the wrongful act that he hath done is called an usurpation.

Secondly, when any subject doth use, without lawful warrant, royal franchises, he is said to usurp upon the king those franchises.

Purprestura, or *pourprestura*, a purpresture. *Purprestura est, &c., generaliter quoties aliquid fit ad nocumentum regii tenementi, vel regie viæ (vel aliquarum publicarum) vel civitatis, &c.* And because it is properly when there is a house builded, or an enclosure made of any part of the king's demesnes, or of an highway, or a common street or public water, or such like public things, it is derived of the French word *pourpris*, which signifieth an inclosure, but specially applied, as is aforesaid, by the common law.

3 BL. COM. 117, 118. *Personal* actions are such whereby a man claims a debt, or personal duty, or damages in lieu thereof : and, likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon *torts* or wrongs : and they are the same which the civil law calls "*actiones in personam quæ adversus eum intenduntur, qui ex contractu vel delicto obligatus est aliquid dare vel concedere.*" Of the former nature are all actions upon debt or promises ; of the latter all actions for trespasses, nuisances, assaults, defamatory words, and the like.

*Real actions*¹ (or, as they are called in the Mirror, *feodal actions*), which concern real property only, are such whereby the plaintiff, here called the demandant, claims title to have any lands or tenements, rents, commons, or other hereditaments, in fee-simple, fee-tail, or for term of life. By these actions formerly all disputes concerning real estates were decided; but they are now pretty generally laid aside in practice, upon account of the great nicety required in their management, and the inconvenient length of their process: a much more expeditious method of trying titles being since introduced, by other actions personal and mixed.

Mixed actions are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained. As for instance an action of waste: which is brought by him who hath the inheritance, in remainder or reversion, against the tenant for life, who hath committed waste therein, to recover not only the land wasted, which would make it merely a *real* action; but also treble damages, in pursuance of the Statute of Gloucester, which is a *personal* recompense; and so both, being joined together, denominate it a *mixed* action.

2 P. & M. HIST. (2d ed.) 74. A graduated hierarchy of actions has been established. "Possessoriness" has become a matter of degree. At the bottom stands the novel disseisin, possessory in every sense, summary and punitive. Above it rises the mort d'ancestor, summary but not so summary, going back to the seisin of one who is already dead. Above this again are writs of entry, writs which have strong affinities with the writ of right, so strong that in Bracton's day an action begun by writ of entry may by the pleadings be turned into a final, proprietary action. The writs of entry are not so summary as are the assizes, but they are rapid when compared with the writ of right; the most dilatory of the essoins is precluded; there can be no battle or grand assize.² Ultimately we ascend to the writ of right. Actions are higher or lower, some lie "more in the right" than others. You may try one after another; begin with the novel disseisin, go on to the mort d'ancestor, then see whether a writ of entry will serve your turn and, having failed, fall back upon the writ of right.

LEAKE, 59. The doctrines concerning rights of entry and of action and the proceedings in real actions were highly technical and elaborate, and formed a large and complicated branch of the law of real property, until the amendments of the law made by the statute 3 & 4 W. IV, c. 27. By that statute, s. 36, real actions were abolished, and the ac-

¹ For an enumeration of the various species of real actions, see 1 Roscoe, *Real Actions*, 3. — Ed.

² As to the conversion of the writ of entry into a writ of right, see Bracton, 1, pp. 318, 319. This doctrine seems to have become obsolete and so the possessori-ness of the writs of entry became more apparent.

tion of ejectment was left as the only, and the comparatively simple, remedy at law for the recovery of the possession of land. By the same statute the right of entry or action is no longer defeated by a descent cast or a discontinuance (s. 39); and it is exempted from all other casualties except lapse of time. But it must be prosecuted within twenty years next after the accrual of the right (s. 2); subject to the provisions of the statute in the case of disabilities in the person entitled (ss. 16-19).

3 BL. COM. 203. In proceeding in the action of ejectment a lease for a term of years is stated to have been made, by him who claims title, to the plaintiff who brings the action, as by John Rogers to Richard Smith, which plaintiff ought to be some real person, and not merely an ideal fictitious one who hath no existence, as is frequently though unwarrantably practised; it is also stated that Smith the lessee entered; and that the defendant William Stiles, who is called the *casual ejector*, ousted him; for which ouster he brings this action. As soon as this action is brought, and the complaint fully stated in the declaration, Stiles, the casual ejector, or defendant, sends a written notice to the tenant in possession of the lands, as George Saunders, informing him of the action brought by Richard Smith, and transmitting him a copy of the declaration: withal assuring him that he, Stiles the defendant, has no title at all to the premises, and shall make no defence: and therefore advising the tenant to appear in court and defend his own title: otherwise he, the casual ejector, will suffer judgment to be had against him; and thereby the actual tenant Saunders will inevitably be turned out of possession. On receipt of this friendly caution, if the tenant in possession does not within a limited time apply to the court to be admitted a defendant in the stead of Stiles, he is supposed to have no right at all; and, upon judgment being had against Stiles the casual ejector, Saunders the real tenant will be turned out of possession by the sheriff.

But, if the tenant in possession applies to be made a defendant, it is allowed him upon this condition; that he enter into a rule of court to confess, at the trial of the cause, three of the four requisites for the maintenance of the plaintiff's action; viz. the *lease* of Rogers the lessor, the *entry* of Smith the plaintiff, and his *ouster* by Saunders himself, now made the defendant instead of Stiles: which requisites being wholly fictitious, should the defendant put the plaintiff to prove them, he must of course be nonsuited for want of evidence; but by such stipulated confession of *lease*, *entry*, and *ouster*, the trial will now stand upon the merits of the *title* only. This done, the declaration is altered by inserting the name of George Saunders instead of William Stiles, and the cause goes down to trial under the name of Smith (the plaintiff), on the demise of Rogers (the lessor), against Saunders, the new defendant. And therein the lessor of the plaintiff is bound to make out a clear title, otherwise his fictitious lessee cannot obtain

judgment to have possession of the land for the term supposed to be granted. But if the lessor makes out his title in a satisfactory manner, then judgment and a writ of possession shall go for Richard Smith, the nominal plaintiff, who by this trial has proved the right of John Rogers, his supposed lessor.

CHAPTER IV.

COPYHOLDS.¹

LEAKE, DIGEST OF LAND LAW, 70, 76, 84, 87, 88, 90, 93, 97. Under the manorial system described in the last chapter the territory of the manor was partly held by the lord in demesne, and partly granted out in fee to freehold tenants upon services. Of the demesne lands part were occupied by the lord himself, and part were usually allotted to a class of tenants, to whom freehold estates, with the attendant rights of freeholders, were not conceded. This class called *villeins*, seem to have been originally in the position of slaves, whose persons and labor from their birth belonged absolutely to the lord. They occupied the parcels of land, necessarily allotted to them for dwelling and maintenance, by a tenure called *villinage*, holding at the will of the lord and being removable at his pleasure.²

In course of time the usage prevailing in the manor in regard to these tenants, under the control and influence of the general law of the land, imposed restrictions upon the lord's absolute right to dispossess them and to the disposal of their persons and services, until by force of custom they ultimately acquired the fixity of tenure, together with the freedom of person and certainty of service, which appears in modern times in customary tenure. Thus, in relation to freehold tenure these lands were still reputed to be *demesne* lands, being held at the will of the lord and resumable at pleasure; but under the customary tenure they became *tenemental* according to the custom of the manor.

The services of villinage consisted chiefly of agricultural labor on the lord's demesne lands; and though originally arbitrary in kind and quality as regards the pure villein, they were afterwards regulated by the custom of the manor. In course of time they were, for the most part, commuted, like other services, into money payments or rents, and thus became rent service recoverable by distress.

Customary tenure in point of form bears the distinctive characteristics of its origin. The tenant is technically described as holding at the will of the lord, according to the custom of the manor.

He has no power of disposition by feoffment, grant or other common law conveyance, but only by surrender and admittance. By custom he may *surrender* his tenancy to the lord *to the use* of any person or per-

¹ See Statute 12 Car. II. c. 24, § 6, *ante*, p. 327.

² "The title to a villein required prescription, i. e. immemorial custom, or, what was equivalent, confession of such title in a court of record. Lit. s. 175."

sons designated by him ; and the lord is bound to *admit* such persons into the tenancy according to the *uses* declared in the surrender.

The surrender and admittance and all other transactions relating to the title are entered upon the rolls of the court of the manor. Copies of the rolls are delivered by the steward to the tenants as evidence of their title ; whence the tenure is called *copyhold*, and the tenants are called *copyholders*, as holding by *copy of Court Roll*.

Land cannot now be granted upon customary or copyhold tenure, unless it has been so granted or grantable by immemorial custom ; because custom alone sanctions this form of tenure. Copyholds have been created by statute in some few instances.

There are two principal kinds of customary tenure : the one *copyhold*, commonly so called, in which the tenant holds *at the will of the lord*, according to the custom of the manor, by copy of court roll ; the other called *customary freehold*, in which the tenant holds by copy, and according to the custom, but *not at the will of the lord*. The distinction is explained by reference to the two kinds of ancient villenage from which modern customary tenure is derived.¹

The term *freehold* as expressing the quantity or duration of estates admissible in freehold tenure, namely, estates for life and of inheritance, is applied by analogy to estates of customary tenure and distinguishes such estates from leasehold or terms of years ; but the *freehold* as expressing the tenure of the land is in the lord, and not in the customary tenant. So the possession of a copyholder for an estate freehold in quantity is commonly termed the customary *seisin*, and the copyholder is said to be *seised* of such estate ; though the terms are strictly applicable only to the possession of the freehold tenant. But there can be no *disseisin*, technically so called, with its peculiar consequences, of a customary tenancy.

By general custom a copyholder in fee might surrender to the use of his will, and by his will declare and limit the uses. The land then passed by the combined effect of the surrender and will, as if the uses declared by the will had been inserted in the surrender ; and the appointee or devisee, upon the death of the testator, was in the position of a surrenderee. Under the will a further power of appointing the uses might be created.

Copyhold land was thus devisable, independently of the statutes of wills, which did not extend to copyholds, and without any other formalities than those, if any, prescribed by the terms of the surrender for the appointment of the uses.

The copyholder's remedy for the recovery of his tenement was originally by a plaint in the nature of a real action in the customary court of the manor ; he had no real action in the superior courts of common law, because he had no freehold title. He might maintain trespass, in right of his possession, in the common law courts, and even against the

¹ See 1 P. & M. Hist. (2d ed.) 403. — ED.

lord ; he might also maintain ejectment through his lessee, founded on his power of giving a common law lease, and the latter form of action became the ordinary mode of recovering copyhold lands.

The copyholder's remedy against the lord, as to surrender and admittance, is by writ of mandamus at common law. A claimant is entitled to admittance on a *prima facie* title, in order to give him the opportunity of asserting it, as the admittance is effectual only according to the validity of the title ; and he cannot, in general, bring ejectment without a legal title by admittance.

The Court of Chancery also exercises a like jurisdiction to compel admittance, and originally, it seems, the jurisdiction was in the Court of Chancery only. The claimant may file a bill in Chancery for this purpose ; but it is more usual now to proceed at common law by mandamus. The Court of Chancery will not assist a claimant to obtain a bare legal title by admittance, if he cannot show any equitable interest to support it.

The lord is entitled to have a tenant upon the rolls, and may by general custom seize and retain the tenement *quousque*, until the tenant comes in and is admitted. The seizure *quousque* is in the nature of process to compel admittance ; but by special custom the lord may be entitled to seize absolutely for want of a tenant, as he may for a forfeiture.

The lord may become entitled to the land by *escheat* upon the death of the tenant without leaving an heir and without having disposed of the tenement by will. By escheat the copyhold estate is merged or extinguished in the freehold, with all its incidents, of customary descent and the like ; but it retains the capacity of being held by copy and may be re-granted in that form of tenure.

Forfeiture is the consequence of certain acts of the tenant which are inconsistent with the customary tenure or are violations of its rules. The alienation of the land by a conveyance operating at common law and purporting to convey an estate of freehold tenure, operates as a disseisin of the lord and a forfeiture. A deed conveying lands and tenements at common law will be construed, if possible, to apply to freehold lands only in order to avoid a forfeiture of copyhold.

A customary estate is extinguished by the union of the freehold and customary title in the same person. The possession is then referred to the freehold title only, and may be disposed of under that title at common law.

Enfranchisement is effected by the lord of the manor conveying the freehold title of the tenement in fee simple to the copyholder ; the customary tenure is thereby wholly extinguished. An enfranchisement operates out of the lord's estate and not by exercise of his power as lord. It is therefore dependent upon his title to the manor, and can only be fully effected by a lord entitled in fee simple, or having a power of disposition to that extent. The conveyance of a less estate, or by a lord entitled for a less estate, would only give a limited title to the

freehold ; though by accepting such less estate the copyholder's interest would be merged and extinguished.¹

¹ Whether a release of all seigniorial rights alone, without conveyance of the freehold estate, operates as an enfranchisement of copyholds, see Scriven, 552. Such release is sufficient to enfranchise tenements held in ancient demesne, and customary freehold or tenant right estates analogous to ancient demesne. *Doe v. Huntington*, 4 East, 271.

CHAPTER V.

USES AND TRUSTS.¹

SECTION I.

USES BEFORE ST. 27 HEN. VIII. C. 10.²

KEILW. 42, PL. 7 (1502). Vavasour, J., said that the subpœna commenced in the time of Edward III.; but this was always against the feoffee upon confidence himself, for against his heir the subpœna was never allowed until the time of Henry VI., and in this point the law was changed by Fortescue, C. J.

2 ROLL. AB. 780. The use shall be of the same nature as the land, and descend as the land ought.

BACON, USES, 16, 20. For the transferring of uses there is no case in law whereby an action is transferred, but the *subpœna* in case of use was always assignable.³

Now for the causes whereupon uses were put in practice, Coke in his reading doth well say, that they were produced sometimes for fear, and many times for fraud. But I hold that neither of these causes were so much the reasons of uses, as another reason in the

¹ On Equity Jurisdiction in general, see Langdell, Eq. Pl. §§ 36-45; Digby, Real Prop. (1st ed.) 244-247; (2d ed.) 285-287; (3d ed.) 276-279; Haynes, Outlines of Eq. 6-20.

² On Uses before the Statute, see also Digby, Real Prop. c. 6; Leake, Digest Land Law, 99-102. "The experience and practice of uses were not ancient, and my reasons why I think so, are these four: First, I cannot find in any evidence before King R. II. his time the clause *ad opus et usum*, and the very Latin of it savoureth of that time; for in ancient time, about Edw. I. and before, when lawyers were part civilians, the Latin phrase was much purer, as you may see partly by Bracton's writing, and by ancient patents and deeds, and chiefly by the register of writs, which is good Latin, whereas this phrase *ad opus et usum*, and the words *ad opus*, is a barbarous phrase, and like enough to be the penning of some chaplain that was not much past his grammar, where he had found *opus* and *usus* coupled together, and that they did govern an ablative case; as they do indeed since this Statute, for they take away the land and put them into a conveyance." Bacon, Uses, 22.

³ Y. B. 27 H. VIII. fol. 8, pl. 22. I say there is no doubt but that if I sell you my use, the use is changed from my person to you; so I understand that if I say to you, "I give you my use in certain lands," you have the use by such words; for the use does not pass as the land does; for land cannot pass except by livery, but a use passes by bare words. — Per YORK.

beginning, which was, that the lands by the common law of England were not testamentary or devisable.

GILBERT, USES, 35. A Use is devisable, for the reason why lands were not originally devisable, was, because the ceremony of livery was required to the transmutation of the possession, which is not necessary to the disposal of an use; for livery is to give notice against whom the *præcipe* is to be brought, and the *præcipe* is only of an estate of freehold.

ST. 1 RICH. III. (1483), c. 1. Forasmuch as by privy and unknown feoffments, great unsurety, trouble, costs, and grievous vexations daily grow among the King's subjects, insomuch that no man that buyeth any lands, tenements, rents, services, or other hereditaments, nor women that have jointures or dowers in any lands, tenements, or other hereditaments, nor men's last wills to be performed, nor leases for term of life, or of years, nor annuities granted to any person or persons for their services for term of their lives or otherwise be in perfect surety, nor without great trouble and doubt of the same, because of the said privy and unknown feoffments: (2) For remedy whereof, be it ordained, established, and enacted, by the advice of the Lords Spiritual and Temporal, and by the Commons in this present Parliament assembled, and by authority of the same, that every estate feoffment, gift, release, grant, leases and confirmations of lands, tenements, rents, services, or hereditaments, made or had, or hereafter to be made or had by any person or persons being of full age, of whole mind, at large, and not in duress, to any person or persons; and all recoveries and executions had or made, shall be good and effectual to him to whom it is so made, had or given, and to all other to his use, (3) against the seller, feoffer, donor, or grantor thereof, (4) and against the sellers, feoffors, donors, or grantors, his or their heirs, claiming the same only as heir or heirs to the same sellers, feoffers, donors, or grantors, and every of them, (5) and against all other having or claiming any title or interest in the same, only to the use of the same seller, feoffer, donor or grantor, sellers, feoffors, donors or grantors, or his or their said heirs at the time of the bargain, sale, covenant, gift or grant made, (6) saving to every person or persons such right, title, action or interest, by reason of gift in tail thereof made, as they ought to have had, if this Act had not been made.¹

ANONYMOUS, JENK. 190 (22 H. VII.). The *cestuy que use* of land, held of the king *in capite* by knight's service, and of other land held of other lords in socage, dies, his heir of full age: the king in this case shall not have primier seisin, nor is there any occasion for

¹ "By this devise the use only passes, and not the land itself, for the statute of 1 R. III. extends only to uses executed in the life of *cestui que use*, and not to devises which are not executed till after the death of the devisor." WALMESLEY in *Ruddall and Miller's Case*, 1 Leon. 298, 299.

livery in one land or the other; for so was the common law; and the statute of 4 H. 7.¹ says, where the heir *cestuy que use* is under age, and no will was declared by him.

By all the Judges of England.

The king, by the common law, suffered no loss in this case; for if the heir of the feoffee to the use was within age; (whether *cestuy que use* was alive, or dead and his heir of full age) the king should have the wardship of the heir of the feoffee, and of the land; and if it happen'd that both the heirs were within age, after the 4 H. 7. and before the Statute of Uses: the king should have the wardship of both; of one by the common law, of the other by the said statute.

At common law, *cestuy que use* did not forfeit the use, for felony or treason; for it is only a confidence; it is so at this day for a trust of a freehold or inheritance; *but 't is* otherwise of a chattel. A feoffee upon trust at this day, commits treason or felony; the land is lost, and escheats, and the trust is extinct; for the king or lord by escheat cannot be seised to an use or trust; for they are in the *post*; and are paramount the confidence.

BROOKE, N. C. 75. Note, if a feoffment be made to the use of W. N. for the term of his life, and after to the use of J. S. and his heirs, there *cestui que use* in remainder or reversion may sell the remainder or reversion in the life of W. N. but he cannot make a feoffment till after his death. 25 H. VIII.

NOTE. — “ But one of the most important circumstances, in the history of the decline of the feud, is, the *introduction of uses*. By these the legal estate of the land was in the feoffee. In fact, therefore, there never was a vacancy in the tenure. But the ownership and beneficial property of the land being absolutely vested in the *cestui que use*, there was no point of connection, between him and the lord. Besides, when a feoffment was made to uses, it seldom happened that the feoffment was made to a single person. The feoffees were numerous, and when their number was reduced to that of one or two persons, a new feoffment was made to other feoffees, to the subsisting uses. In the meantime, the ownership of the land was transmitted and aliened, at the will of the *cestui que use*. It is evident that, while the fief was held in this manner, there was a wide separation between the lord and the tenant. It must also be observed, that, where there was a feoffment to uses, the fruits of tenure incident to purchase, became seldom due, and those incident to descent almost never accrued to the lord. Now, where a person took by purchase, the lord was only entitled to the trifling acknowledgment of relief: when he came in by descent, the lord was entitled to the grand fruits of military tenure, wardship, and marriage. From these observations, it is clear, how great a fraud was practised upon the lord, by the introduction of uses. A fief thus circumstanced, presented an apparent tenant to the lord, but it was almost barren of every fruit and advantage of tenure, and the land itself was entirely subtracted from the feud. Hence we find, that, among the mischiefs recited in the preamble to the Statute of Uses, the loss to the lord, of the fruits of tenure, is particularly insisted on. It does not fall within the

¹ Sec. 4 of Statute 4 H. VII. c. 17 (1487), provided that where *cestui que use* in fee simple of lands held by knight service, died, leaving his heir an infant and not having disposed of his interest by will, the lord of whom the land was held should have wardship. By Sec. 5, if any such heir was of full age, he should pay relief.

nature of these observations, to mention the steps which were taken to extirpate uses. One of them was the Statute of the 1 Richard the 2d. cap. 9, which gave an action to the disseisee, both against the feoffee, and the *cestui que use*. It is observable, that the *senatus consultum Trebonianum* gave the same right of action against the *heredes fidei commissarius*. Unquestionably the object of the Statute of the 27 of Henry 8 was to effect a total extirpation of uses." Co. Lit. 191 a, Butler's note, VI. 11.

"The introduction of *Uses* produced a great revolution in the transfer and modification of landed property. Without entering into a minute discussion of the difference between uses at common law, and uses since the Statute of 27 H. 8, — a point, particularly well explained in Mr. Sanders's Essay on Uses and Trusts, it is sufficient to state the following circumstances. Uses at the common law were, in most respects, what trusts are now. When a feoffment was made to uses, the legal estate was in the feoffee. He filled the possession, did the feudal duties, and was, in the eye of the law, the tenant of the fee. The person to whose use he was seised, called by the law-writers the *cestuy que use*, had the beneficial property of the lands, had a right to the profits, and a right to call upon the feoffee to convey the estate to him, and to defend it against strangers. This right at first depended on the conscience of the feoffee: if he withheld the profits from the *cestuy que use*, or refused to convey the estate as he directed, the *cestuy que use* was without remedy. To redress this grievance, the writ of subpoena was devised, or rather adopted from the common-law courts, by the Court of Chancery, to oblige the feoffee to attend in court, and disclose his trust, and then the court compelled him to execute it. Thus uses were established. — They were not considered as issuing out of, or annexed to the land, as a rent, a condition, or a right of common; but as a trust reposed in the feoffee, that he should dispose of the lands, at the discretion of the *cestuy que use*, permit him to receive the rents, and, in all other respects, to have the beneficial property of the lands. Yet an use, though considered to be neither issuing out of, or annexed to the land, was considered to be collateral to it, or rather as collateral to the possession of the feoffees in it, and of those claiming *that* possession under them. Hence the disseisor, abator, or intruder of the feoffee, or the tenant in dower, or by the courtesy of a feoffee, or the lord entering upon the possession by escheat, were not seised to an use, though the estates in their hands were subject to rents, commons and conditions. They were considered as coming in by a paramount and extraneous title; or, as it is called in the law, *in the post*, in contradistinction from those who, claiming under the feoffee, were said to be *in the per*. Thus, between the feoffee and *cestui que use*, there was a confidence in the person and privity in estate. (See *Chudleigh's Case*, 1 Rep. 120, and *Burgess and Wheate*, 1 Bla. 123.) But this was only between the feoffee and *cestui que use*. To all other persons the feoffee was as much the real owner of the fee, as if he did not hold it to the use of another. *He* performed the feudal duties; *his* wife was entitled to dower; *his* infant heir was in wardship to the lord; and, upon *his* attainder, the estate was forfeited. To remedy these inconveniences, the Statute of 27 H. 8 was passed, by which the possession was divested, out of the persons seised to the use, and transferred to the *cestuis que use*. For, by that Statute, it is enacted, that, 'when any person shall be seised of any lands to the use, confidence, or trust of any other person or persons, by reason of any bargain, sale, feoffment, fine, recovery, contract, agreement, will, or otherwise: then, and in every such case, the persons having the use, confidence, or trust, should from thenceforth be deemed and adjudged in lawful seisin, estate, and possession of and in the lands, in the same quality, manner, and form, as they had before in the use.' " Co. Lit. 271 b, Butler's note, II.

"Down to the time of Hen. VI., the *cestui que trust* could only proceed in the Court of Chancery against the feoffee in trust himself; indeed it was insisted by the common-law judges in the reign of Edw. IV., that a subpoena did not lie against the heir of the trustee; afterwards, by universal consent, it was extended to his heir, and then to alienees with express notice of the trust, or without valuable consideration, in which case notice was implied. But a purchaser of the legal estate for

SECTION II.

STATUTE OF USES.¹

ST. 27 HEN. VIII. (1536) c. 10. Where by the common laws of this realm, lands tenements and hereditaments be not devisable by testament, (2) nor ought to be transferred from one to another, but by solemn livery and seisin, matter of record, writing sufficient made *bona fide*, without covin or fraud; (3) yet nevertheless divers and sundry imaginations, subtle inventions and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances craftily made to secret uses, intents and trusts; (4) and also by wills and testaments, sometime made by nude parolx and words, sometime by

valuable consideration *bona fide*, without notice, might then, as now, hold the land discharged of any trust or confidence; the only remedy was against the feoffee, or his executor if the feoffee were dead.

"If the feoffee to uses died without heir, or committed a forfeiture, or married, neither the lord who entered for the escheat or forfeiture, nor the husband who retained the possession as tenant by the curtesy, nor the wife to whom dower was assigned, was liable to perform the trust, because they were not parties to the transaction, but came in by act of law, or in the *post*, and not in the *per*, as it was said, though doubtless their title in reason was no better than that of the heir against whom the remedy was extended. It was the same as regards any other person who obtained possession, not claiming by any contract or agreement with the feoffee, between whom and the *cestui que use*, therefore, there was no privity. 'Where there was no trust, there could be no breach of trust.' The remedy against a disseisor, therefore, was not in chancery at the instance of the *cestui que trust*, but at law at the instance of the feoffee; and it was part of his duty to pursue his legal remedies at the desire of the *cestui que trust*.

"As regards the *cestui que trust* also, privity was in some sense essential to his obtaining relief; thus, on the death of the original *cestui que trust*, in the case of a simple trust or use, the right to sue a subpoena was held to descend to the heir as representing his ancestor; but neither a wife, a husband, nor judgment creditor was entitled to this privilege." 1 Spence Eq. Jur. 445.

¹ "And as to the making of the Statute of 27 H. 8, the truth is, that the king was displeased for the loss of Wardships, and other injuries done to him; for which cause he complained to the Judges of the defect of the Law in that case who therefore shewed unto the King the causes of those injuries and losses to the King; and farther shewed to the King, That if the possession might be joined to the use, all would go well, and all the injuries, wrong, and loss, which came to the king by reason of such Uses, Wills, and secret Feoffments, would be avoided: For which the King commanded his Council to frame a Bill to that purpose, and present it to the House of Commons in the twenty-fourth year of his reign, but it was then rejected; and the king at that time would have been contented, that the fourth part of the land only should descend: and from that time the King stayed farther proceedings in the said cause until 27 H. 8, at which time it took effect: And their cure was to pen the Statute so precisely, that nothing should be left in the Feoffees, but that the whole estate should be executed by the Statute, so as the said Statute did utterly take out all from the Feoffees." HARPER, J., in *Brent's Case*, 2 Leon. 14, 16. — ED.

signs and tokens, and sometime by writing, and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such time as they have scantly had any good memory or remembrance; (5) at which times they being provoked by greedy and covetous persons lying in wait about them, do many times dispose indiscreetly and unadvisedly their lands and inheritances; (6) by reason whereof, and by occasion of which fraudulent feoffments, fines, recoveries, and other like assurances to uses, confidences and trusts, divers and many heirs have been unjustly at sundry times disinherited, the lords have lost their wards, marriages, reliefs, harriots, escheats, aids *pur fair fils chivalier & pur file marier*, (7) and scantly any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions or executions for their rights, titles and duties; (8) also men married have lost their tenancies by the curtesy, (9) women their dowers, (10) manifest perjuries by trial of such secret wills and uses have been committed; (11) the King's Highness hath lost the profits and advantages of the lands of persons attainted, (12) and of the lands craftily put in feoffments to the uses of aliens born, (13) and also the profits of waste for a year and a day of lands of felons attainted, (14) and the lords their escheats thereof; (15) and many other inconveniences have happened and daily do increase among the King's subjects, to their great trouble and inquietness, and to the utter subversion of the ancient common laws of this realm; (16) for the extirping and extinguishment of all such subtle practiced feoffments, fines, recoveries, abuses and errors heretofore used and accustomed in this realm, to the subversion of the good and ancient laws of the same, and to the intent that the King's Highness, or any other his subjects of this realm, shall not in any wise hereafter by any means or inventions be deceived, damaged or hurt, by reason of such trusts, uses or confidences: (17) it may please the King's most royal majesty, That it may be enacted by his Highness, by the assent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the authority of the same, in manner and form following; that is to say, That where any person or persons stand or be seised, or at any time hereafter shall happen to be seised, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders or other hereditaments, to the use, confidence or trust of any other person or persons, or of any body politick, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will or otherwise, by any manner means whatsoever it be; that in every such case, all and every such person and persons, and bodies politick, that have or hereafter shall have any such use, confidence or trust, in fee simple, fee tail, for term of life or for years, or otherwise, or any use, confidence or trust, in remainder or reverter, shall from henceforth stand and be seised, deemed and adjudged in lawful seisin, estate and possession of and in the same honours, castles, manors, lands, tenements, rents, services, reversions,

remainders and hereditaments, with their appurtenances, to all intents, constructions and purposes in the law, of and in such like estates as they had or shall have in use, trust or confidence of or in the same; (19) and that the estate, title, right and possession that was in such person or persons that were, or hereafter shall be seised of any lands, tenements or hereditaments, to the use, confidence or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them that have, or hereafter shall have, such use, confidence or trust, after such quality, manner, form and condition as they had before, in or to the use, confidence or trust that was in them.

II. And be it further enacted by the authority aforesaid, That where divers and many persons be, or hereafter shall happen to be, jointly seised of and in any lands, tenements, rents, reversions, remainders or other hereditaments, to the use, confidence or trust of any of them that be so jointly seised, that in every such case that those person or persons which have or hereafter shall have any such use, confidence or trust in any such lands, tenements, rents, reversions, remainders or hereditaments, shall from henceforth have, and be deemed and adjudged to have only to him or them that have, or hereafter shall have any such use, confidence or trust, such estate, possession and seisin, of and in the same lands, tenements, rents, reversions, remainders and other hereditaments, in like nature, manner, form, condition and course, as he or they had before in the use, confidence or trust of the same lands, tenements or hereditaments; (2) saving and reserving to all and singular persons and bodies politic, their heirs and successors, other than those person or persons which be seised, or hereafter shall be seised, of any lands, tenements or hereditaments, to any use, confidence or trust, all such right, title, entry, interest, possession, rents and action, as they or any of them had, or might have had before the making of this Act.

III. And also saving to all and singular those persons, and to their heirs, which be, or hereafter shall be seised to any use, all such former right, title, entry, interest, possession, rents, customs, services and action, as they or any of them might have had to his or their own proper use, in or to any manors, lands, tenements, rents or hereditaments, whereof they be, or hereafter shall be seised to any other use, as if this present Act had never been had nor made; any thing contained in this Act to the contrary notwithstanding.

IV. And where also divers persons stand and be seised of and in any lands, tenements or hereditaments, in fee-simple or otherwise, to the use and intent that some other person or persons shall have and perceive yearly to them, and to his or their heirs, one annual rent of x. li. or more or less, out of the same lands and tenements, and some other person one other annual rent, to him and his assigns for term of life or years, or for some other special time, according to such intent and use as hath been heretofore declared, limited and made thereof:

V. Be it therefore enacted by the authority aforesaid, That in every such case the same persons, their heirs and assigns, that have such use and interest, to have and perceive any such annual rents out of any lands, tenements or hereditaments, that they and every of them, their heirs and assigns, be adjudged and deemed to be in possession and seisin of the same rent, of and in such like estate as they had in the title, interest or use of the said rent or profit, and as if a sufficient grant, or other lawful conveyance had been made and executed to them, by such as were or shall be seised to the use or intent of any such rent to be had, made or paid, according to the very trust and intent thereof, (2) and that all and every such person and persons as have, or hereafter shall have, any title, use and interest in or to any such rent or profit, shall lawfully distrain for non-payment of the said rent, and in their own names make avowries, or by their bailiffs or servants make conisances and justifications, (3) and have all other suits, entries and remedies for such rents, as if the same rents had been actually and really granted to them, with sufficient clauses of distress, re-entry, or otherwise, according to such conditions, pains, or other things limited and appointed, upon the trust and intent for payment or surety of such rent.

SECTION III.

USES RAISED ON TRANSMUTATION OF POSSESSION.

Co. Lit. 271 b. Note, uses are raised either by transmutation of the estate, as by fine, feoffment, common recovery, &c. or out of the state of the owner of the land, by bargain and sale by deed indented and enrolled, or by covenant upon lawful consideration.

DYER, 111 b, *in marg.* Noy, of Lincoln's Inn, Mich. 19, Jac. at Moot in the Hall put this difference, that if a man make a feoffment in fee to the use of himself for life, the fee-simple remains in the feoffees, for otherwise he will not have an estate for life according to his intention; but if the use be limited to himself in tail, it is otherwise, for both estates may be in him.

M. 34 & 35 Eliz. in the Court of Wards, in the argument of the *Earl of Bedford's Case* [2 And. 197; Moor. 718] it was holden by POPHAM and ANDERSON, that if A. make a feoffment to the use of himself for forty years, and does not limit any other estate, the fee is in the feoffees.¹

¹ It was said, if a man at this day seised of the land on the part of the mother, makes a feoffment in fee, without consideration, he shall be seised, as he was before, on the part of the mother. And if there be two joint-tenants, one for life, and the other in fee, and they levy a fine without declaration of any use, the use shall be to them of the same estate as they had before in the land. So if A. tenant for life,

SAME'S CASE.

EXCHEQUER. 1609.

[*Reported 2 Roll. Ab. 791.*]

IF A. in consideration of £100 by B. makes a feoffment in fee to B. to the use of B. and C. the son of B., that will raise a use to C. well enough, though the whole consideration was given by B.

ST. 29 CAR. II. (1676), c. 3, § 7. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June [1677] all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

§ 8. *Provided* always, That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; anything hereinbefore contained to the contrary notwithstanding.

SHORTRIDGE *v.* LAMPLUGH.

KING'S BENCH. 1702.

[*Reported 2 Salk. 678.*¹]

H. BROUGHT covenant as assignee of a reversion, and showed, that the lessor, in consideration of £5, bargained and sold to him for a year,

and B. in reversion or remainder, levy a fine generally, the use shall be to A. for life, the reversion or remainder to B. in fee; for each grants that which he may lawfully grant, and each shall have the use which the law vests in them, according to the estate which they convey over. If A. is seised in fee of an acre of land, and he and B. levy a fine of it to another, without consideration, the use implied shall be to A. only and his heirs; for an use which is but a trust and confidence, and a thing in equity and conscience, shall be, by operation of law, to him who, in truth, was owner of the land, without having regard to estoppels or conclusions, which are averse to truth and equity. So it was adjudged in the principal case, when husband and wife levy a fine without declaration of any use (which was sufficient in law), the law shall revest the use in the wife only; because the estate in the land passes only from her, and the husband joins with her but for conformity." *Beckwith's Case*, 2 Co. 56 b, 58 a (1589).

¹ s. c. 2 Ld. Raym. 798; 7 Mod. 71.

and afterwards released to him and his heirs, *virtute quarundam indentur. bargainæ venditionis & relaxationis necnon vigore statuti de usibus*, &c. he was seised in fee. And it was objected, that the use must be intended to be to the releasor and his heirs, because no consideration of the release nor express use appeared by the pleading: so that without considering the operation of the conveyance, the question was upon the pleading, Whether the use shall be intended to the releasor, unless it be averred to be to the releasee? *Et per* HOLT, C. J. to which the rest agreed:—

This way of pleading was certainly good before the Statute 27 H. 8, so is Plowd. 478, and many precedents in Co. Ent. of feoffments averred in the same manner; for the use was a matter that was extrinsic to the deed, and depended upon collateral agreements at common law, and then the use might, *as since the Statute of Frauds by writing*, be averred by parol, and therefore in pleading the conveyance was taken to the use of him to whom the conveyance was made, till the contrary appeared; if it were otherwise, it ought to come on the other side; and 27 H. 8, has not altered the course of pleading, which is rather confirmed by the Statute; because, if now the use be construed to be to the releasor or feoffor, the conveyance will be to no manner of purpose, it being still the old estate to which the old warranty and other qualities remain annexed; whereas before the Statute there might be some end in making the feoffment, viz. to put the freehold out of him and prevent wardship; and Co. Lit. goes no farther, than where is a feoffment to particular uses and estates, the residue of the use shall be to the feoffor, which is reasonable; for the raising those particular estates appears a sufficient reason for the conveyance. And POWELL, J. doubted, whether there could be a resulting use on a lease and release, unless where particular uses are limited; for this way of conveyance is grounded on the ancient way of releasing at common law, wherein there was a merger of estate, which is a good consideration, as where the lessor confirms to the lessee and his heirs. In error of a judgment of C. B. which was affirmed.

BROUGHTON v. LANGLEY.

KING'S BENCH. 1703.

[Reported 2 Salk. 679.¹]

ONE seised of lands in fee, devised them to trustees and their heirs, to the uses, intents, and purposes hereinafter mentioned, viz. to the intent and purpose to permit A. to receive the rents and profits for his life, and after that the trustees should stand seised of the premises to the use of the heirs of the body of A. with a proviso, that A. with the

¹ See s. c. reported at greater length, 2 Ld. Raym. 878.

consent of his trustees, might make a jointure for his wife; and the question was, Whether A. had an estate-tail executed, or not? And it was adjudged he had. HOLT, C. J. pronounced the judgment of the court, and gave these reasons: 1st, That this would have been a plain trust at common law, and what at common law was a trust of a freehold or inheritance is executed by the Statute, which mentions the word *trust* as well as *use*; and the case in 2 Vent. 312, *Burchet* and *Durdant*, is not law; and that the change of expression in the principal case by using the word *permit* in the first clause, which are words of trust, and afterwards making mention of a use, is immaterial, in regard trusts at common law and uses are equally executed by the statute.

2dly, It was held, That a power to make a jointure, does not necessarily exclude an estate in tail, or an intent to give it; because tenant in tail, without discontinuing or barring the tail, cannot make a jointure; and so this power has its use.

ARMSTRONG v. WOLSEY.

COMMON BENCH. 1756.

[Reported 2 Wils. 19.]

EJECTMENT, tried at Norwich before Parker, Ch. Baron, who reserved this short case for the opinion of the court. A. B. being in possession of the lands in question levied a fine *sur conusans de droit come ceo*, &c. with proclamations to the conusee and his heirs, in the 6th year of the present king, without any consideration expressed, and without declaring any use thereof; nor was it proved that the conusee was ever in possession.

So that the single question is, whether the fine shall enure to the use of the conusor or the conusee; and after two arguments the court was unanimous, and gave judgment for the plaintiff, who claimed as heir of the conusor.

CURIA: In the case of a fine *come ceo*, &c. where no uses are declared, whether the conusor be in possession, or the fine be of a reversion, it shall enure to the old uses, and the conusor shall be *in* of the old use, and although it passes nothing, yet after five years and non-claim it will operate as a bar.

And in the case of a recovery suffered, the same shall enure to the use of him who suffers it (who is commonly the vouchee) if no uses be declared; but he gains a new estate to him and his heirs general; and although before the recovery he was seised *ex parte materna*, yet afterwards the estate will descend to his heirs *ex parte paterna*, as was determined in *Martin v. Strachan*, 1 Wils. 2, 66. *Sed vide* that case 2 Stra. 1179.

In the case at bar, the ancient use was in the conusor at the time of levying the fine; and it seems to have been long settled before this case, that a fine without any consideration, or uses thereof declared, shall enure to the ancient use in whomsoever it was at the time of levying the fine; and as it was here in the conusor at that time, the judgment must be for the plaintiff.¹

1 SAND. USES (5th ed.), 96-98. As the Statute did not expressly abolish all future limitations of, and estates created by, uses, there was actually no avoiding the execution of uses, limited or occasioned by conveyances made subsequently to the Act. When a feoffment was made without consideration and declaration of the use, what construction was to be adopted? We have seen, that, before the Act, the Chancery, which judged according to the intention of the parties, would have construed the *possession* to be in the feoffee, and the *use* in the feoffor. Does the Statute destroy this construction? On the contrary, the case appears to come directly within the meaning of it; the words being, *that where any person, &c. stands seised to the use of another*, by reason of any feoffment, &c. or *by any manner of means whatsoever*, then, &c. In this case, the feoffee stands seised to the use of another, viz. the feoffor, by an admitted construction before the Act. The Act certainly did not intend to alter the manner of raising uses; nor did it mean to make anything pass by a conveyance, which did not pass before; that is to say, it did not mean, that the *land* and *use* should now pass in a case, in which the *land* only passed before the Statute. *Vide* 2 Raym. 800; Co. Lit. 22 b; Jenk. Cent. 253. It may therefore be considered as a general rule, that if a feoffment be made, a fine levied, or recovery suffered without consideration and declaration of the use, the use will result to the feoffor, &c. and be executed in him by the Statute. *Armstrong v. Wolsey*, 2 Wils. 19; Doug. 26; *Beckwith's Case*, 2 Co. 56, 58 b; Dyer, 146 b; 1 Roll. Ab. 781; *Read v. Errington*, Cro. Eliz. 321; 22 Vin. 214, pl. 1, and notes.

Indeed it is said, *Shortridge v. Lamplugh*, 2 Salk. 678; 7 Mod. 71; 1 Stra. 107, that if a feoffment be pleaded, the use need not be averred to the feoffee; because if nothing appear to the contrary, the use must be intended to be in him; and that such was the form of pleading *before* the Statute. If this be the course of pleading, it may be asked, What utility can arise from the doctrine of resulting uses? To which it may be answered, that although the rules of pleading do not require an averment of the use in favor of the feoffee, yet it may be averred to be in the feoffor; and that the want of a consideration and declaration of the use is a sufficient circumstance to prove, that it was intended for him.²

¹ See *Roe v. Popham*, 1 Doug. 25.

² *Anglesea v. Altham*, Holt Rep. 737; 1 Stra. 107. In the margin of Salkeld's Reports, which belonged to the late Serjeant Hill, opposite to the case of *Shortridge v. Lamplugh*, is the following MS. note, which, although not in the handwriting of, is evidently dictated by, the learned Serjeant.

"*Contra*, Vin. Uses (Y. a) pl. 1, and the notes, pl. 24; but most of the cases there

I must here observe, that uses generally result according to the estate and interest of the person or persons making the conveyance; *Roe v. Popham*, Dougl. 24, and 22 Vin. 215, pl. 2, and notes, and pl. 6, 7; and he or they, in that case, claim under the old use. However, when a tenant in tail suffers a recovery without consideration or declaration of the use, the use (notwithstanding the aspect of some of the cases; see *Argol v. Cheney*, Latch. 82; *Waker v. Snow*, Palm. 359) will result to the *recoveree in fee*: 9 Co. 8 b; Gilb. Uses, 61; *Nightingale v. Ferrers*, 3 P. W. 206; for as the recoveror or demandant acquires a seisin in fee, the use, if it result at all, must result according to the extent of that seisin; the words of the Act being, that the *estate, title, right, and possession* of the person seised to the *use* shall be transferred to the *cestui que use*; and in the very distinguished argument of the Chief Justice Lee, in delivering the opinion of the court in the case of *Martin v. Strahan*, 5 Term Rep. 107, 110, in note, is the following passage: "It is the use of the *fee-simple* that passes to the recoveror from *tenant in tail*, and which results to *him* (i. e. tenant in tail) *and his heirs*, if no use is declared."

2 HAYES CONV. (5th ed.) 464, 465. The limitations in a deed operating under the Statute of Uses must, in their creation, be either —

1. Vested, — conferring, therefore, legal estates (as, where the land is limited to A. for life, remainder to B. for life or in tail, remainder to C. in fee, or to A. for life, remainder to B. for life or in tail), in which case the whole use of the fee-simple (in the first example), or such portion of the use as the limitations embrace (in the second example), is immediately drawn out of the grantor, covenantor, &c., and executed in the *cestui que use* by the statute, and the undisposed of residue of the use (in the second example), results to, or remains in, the grantor, &c., as a reversion expectant on the particular estates created by the limitations; — or,

2. Not vested, and not, therefore, conferring legal estates (as to the heirs of the body of B., a person now living, or to A. for life, if he shall return from Rome, remainder to the heirs of the body of B., a person now living, or from and after Christmas-day next to A. in fee), in which case the *whole* use of the fee-simple results to, or remains in, the grantor, &c., subject to be drawn out of him, to the extent of the estates to be conferred by the limitations, on their becoming vested, either as remainders, if eventually capable of effect as such (for, in the second example, the limitation to the heirs of the body of B. would, if A. should return from Rome in B.'s lifetime, be good as a contingent remainder),

cited before the Statute; and, therefore, Q. if since the Statute it is not necessary, in pleading a feoffment or release, for the feoffor or releasor to make an averment, that it was to his use? and it seems, that the want of a consideration would be evidence of the truth of such averment, if traversed; but if the deed purports a valuable consideration, the feoffor or releasor cannot be admitted to take such averment. Dyer, 169, pl. 21, S. P. 9; Co. 11 b, accordingly as to a recovery, and Salk. 676, pl. 2, as to a fine and feoffment."

or if not so capable, and if confined within the bounds prescribed by the rule against perpetuities, then as springing or future uses ; — or,

3. Partly vested, and partly not vested (as, to A. for life, remainder to the heirs of the body of B., a person now living, remainder to C. in fee; or to A. for life, and, at the end of one year or one day after his death, to the heirs of the body of B., a person now living), in which case such portion of the use as the vested limitations embrace, is immediately drawn out of the grantor, &c., and executed in the *cestuis que use* by the statute ; and the undisposed of *residue* of the use results to, or remains in, the grantor, &c., as a reversion expectant on the particular estates created by such vested limitations, subject to be drawn out of him, to the extent of the estates to be conferred by the remaining limitations, on their becoming vested, either as remainders, or as springing or future uses.

The foregoing propositions, of course, assume that, in deeds taking effect by transmutation of possession, there is nothing to rebut the supposed resulting use, and fix it in the feoffees, releasees, &c. ; and it should be observed that the legal use will not result to the grantor, releasor, &c., where it would defeat the intent of the conveyance by merging a particular estate expressly limited to the grantor, releasor, &c.¹

Assuming these positions to be accurate, it would seem to flow from them, as a necessary consequence, that by no possibility can a *particular* estate of freehold, in any case, result to, or remain in, the grantor, covenantor, &c. ; — for,

1. Where no limitation is vested, less than the *whole* use of the fee-simple cannot result or remain ; — and,

2. Where all or some of the limitations are vested, and absorb the whole use of the fee-simple, *nothing* can result or remain ; — and,

3. Where all or some of the limitations are vested, but do not absorb the whole use of the fee-simple, the *residue* of the use (being the ultimate remnant of the ancient use) will result or remain, as a reversion expectant on such portion of the use as passes in the particular vested estates.

On principle,² it is conceived that the grantor, &c., cannot be *in* of a *particular* estate of freehold, as part of his old use, whereof he hath not disposed, because if he make a *partial* disposition of the use, it must be in some particular vested estate or estates ; and, such particular estate or estates being deducted, the residue will be the use of the *ulterior* fee-simple.

LEAKE, DIGEST LAND LAW, 107, 108. Upon the same principle, if upon a feoffment or conveyance in fee the use be declared for a particular

¹ “ But it is said, that if a man be seised of land in fee, and grant a rent issuing out of the land to a stranger, without any consideration, &c., the grantee shall be seised of this rent to his own use ; for the law cannot intend such a grant to be made to the use of the grantor.” Perk. § 531.

² But see *Pibus v. Mitford*, 1 Vent. 372 ; Fearne, C. R. 42.

estate only, and no consideration appear to carry the residue, so much of the use as is undisposed of by the declaration remains in the grantor as a resulting use.¹ Thus, if the use be declared to the grantee or another for life, or in tail, or for years only, the reversion of the use being undisposed of results to the grantor. And a consideration paid in such case will be presumptively attributed to the estate limited, and will afford no inference as to the use undisposed of.²

But if the use be declared to the *grantor* for an estate for life or years, the reversion, though not expressly disposed of, does not result to him but vests in the grantee; for by the opposite construction the particular estate would merge in the reversion and the grantor would resume the entire fee, against the express terms of the declaration of uses, which restricts his interest to the particular estate. If, however, the use be declared to the grantor for an estate tail, he may also take the reversion by resulting use; for an estate tail and the reversion in fee may subsist together in the same person.³

If the feoffment or conveyance of the legal possession be made for a particular estate only, as a gift in tail, or a lease for life or for years, the tenure alone thereby created, with its attendant services and obligations, supplied a consideration sufficient to prevent the use from resulting, and to carry it to the donee or lessee; and this doctrine applies at the present day. But an express use declared in favor of another would rebut the use implied from the tenure in such cases.⁴ The Statute *Quia emptores* prevented the creation of any tenure which might carry the use upon a conveyance of the fee simple.⁵

SECTION IV.

USES RAISED WITHOUT TRANSMUTATION OF POSSESSION.⁶

ST. 27 HEN. VIII., c. 16. ST. OF ENROLMENTS (1536). Be it enacted by the authority of this present Parliament, That from the last day of

¹ Co. Lit. 23 a, 271 b; 1 Sanders Uses, 61, 103.

² 1 Sand. Uses, 104; Co. Lit. 22 b, 271 b.

³ Bacon on Uses, Rowe's ed. notes, p. 223; 1 Sanders on Uses, 103; see *Adams v. Savage*, 2 Salk. 679; L. Raym. 854. "Generally speaking, when two estates unite in the same person in the same right, the smaller one is merged in the other, except in the case of an estate tail and a reversion in fee, which may exist together: in such case by the operation of the Statute *De donis*, the estate tail is kept alive, not merged by the reversion in fee." *Per* KENYON, C. J., 5 T. R. 110, in *Roe v. Baldwere*.

⁴ Perkins, §§ 534-537; 2 Leon. 16, *Brent's Case*; Dyer, 312 a. The relation of landlord and tenant is a consideration in law, hence in a contract for a lease no other consideration is necessary. *King's Leaseholds*, L. R. 16 Eq. 521. [See particularly 1 Sand. Uses (5th ed.) 86-88. — Ed.]

⁵ Perkins, §§ 528, 529.

⁶ See Digby, *Hist. Real Prop.* (5th ed.) 326-328.

July, which shall be in the year of our Lord God 1536, no manors, lands, tenements or other hereditaments, shall pass, alter or change from one to another, whereby any estate of inheritance or freehold shall be made or take effect in any person or persons, or any use thereof to be made, by reason only of any bargain and sale thereof, except the same bargain and sale be made by writing indented sealed, and inrolled in one of the King's courts of record at Westminster, (2) or else within the same county or counties where the same manors, lands or tenements, so bargained and sold, lie or be, before the *Custos Rotulorum* and two justices of the peace, and the clerk of the peace of the same county or counties, or two of them at the least, whereof the clerk of the peace to be one; (3) and the same enrolment to be had and made within six months next after the date of the same writings indented; (4) the same *Custos Rotulorum*, or justices of the peace and clerk, taking for the enrolment of every such writing indented before them, where the land comprised in the same writing exceeds not the yearly value of forty shillings, ii. s. that is to say, xij. d. to the justices, and xij. d. to the clerk; (5) and for the enrolment of every such writing indented before them, wherein the land comprised exceeds the sum of xl. s. in the yearly value, v. s. that is to say, ii. s. vi. d. to the said justices, and ii. s. vi. d. to the said clerk for the enrolling of the same: (6) and that the clerk of the peace for the time being, within every such county, shall sufficiently enroll and ingross in parchment the same deeds or writings indented as is aforesaid; (7) and the rolls thereof at the end of every year shall deliver unto the said *Custos Rotulorum* of the same county for the time being, there to remain in the custody of the said *Custos Rotulorum* for the time being, amongst other records of every of the same counties where any such enrolment shall be so made, to the intent that every party that hath to do therewith, may resort and see the effect and tenor of every such writing so enrolled.

II. Provided always, That this Act, nor any thing therein contained, extend to any manner lands, tenements, or hereditaments, lying or being within any city, borough or town corporate within this realm, wherein the mayors, recorders, chamberlains, bailiffs or other officer or officers have authority, or have lawfully used to enroll any evidences, deeds, or other writings within their precinct or limits; any thing in this act contained to the contrary notwithstanding.

SHARINGTON v. STROTTON.

QUEEN'S BENCH. 1565.

[*Reported Plowd.* 298.]

TRESPASS *quare clausum*,¹ on March 20, 1564. The defendants pleaded that the *locus* was, and from time immemorial had been, parcel of the Manor of Bremble; whereof Andrew Baynton being seised in fee, by an indenture made in 1560, between said Andrew, of the one part, and Edward Baynton, his brother, of the other part, it was covenanted, granted, and agreed between the parties in manner and form following; that is to say, whereas Andrew, at the date of the indenture, had no issue male of his body, said Andrew, then being fully determined and resolved how, in what manner, quality, and degree said manor should continue, remain, and be, as well in his lifetime as after his death, and then being desirous that the said manor might come, remain, and descend to the heirs male of his body, in manner and form afterwards expressed, and to the intent that it might continue and remain to such of the blood and name of Baynton as in the same indenture should be named, mentioned, and contained, did, as well for the said causes as for the good-will, fraternal love, and favor which he bore, as well to Edward Baynton his brother, as to such others of his brothers as should be in the indenture named, covenant and grant, for himself and his heirs, that he, his heirs and assigns, and all and every other person or persons and their heirs, who then were seised or should afterwards stand or be seised of said manor, should from thence stand and be thereof seised, to the use of Andrew for life, and after his death to the use of Edward Baynton and Agnes his wife, and their assigns for their lives, and after their death to the use of the heirs male of Andrew lawfully begotten or to be begotten on the body of Frances Lee, and for default thereof to the use of the heirs male of the body of Edward Baynton, and for default thereof to the use of Henry Baynton, another brother, and the heirs male of his body, and for default thereof to the use of another Henry Baynton, a half-brother, and the heirs male of his body, by force of which covenant, grant, and agreement, and of the Statute made the fourth day of February in the twenty-seventh year of the reign of King Henry VIII., concerning the transferring of Uses into Possession, said Andrew was seised of said manor, the remainder over to Edward and Agnes for their lives, remainder to the heirs male of Andrew lawfully begotten on the body of Frances Lee, with remainders over; that Andrew died February 6, 1564, without heirs male of his body; that thereafter, but before the trespass, Edward and Agnes Baynton entered into the manor and were seised; that the plaintiffs then entered; and that the defendants as servants of Edward and

¹ This short statement of the case is substituted for that in the report.

Agnes Baynton, and by their command, re-entered and did the trespass, &c. The plaintiffs demurred.

The case was argued at Michaelmas Term, 1565.

And after these arguments the court took time to deliberate until Hilary Term, and from thence until Easter Term, and from thence until this present Trinity Term, in the eighth year of the reign of the present Queen, and the defendants now prayed judgment. And CORBET, Justice, said, that he and all his companions had resolved that judgment should be given against the plaintiffs. For it seemed to them that the considerations of the continuance of the land in the name and blood, and of brotherly love, were sufficient to raise the uses limited. But, he said, as my Lord Chief Justice is not now present, you must move it again when he is present, and you shall have judgment. And afterwards, at another day, CATLINE, Chief Justice, being present, the apprentice prayed judgment. And CATLINE and the court were agreed that judgment should be entered against the plaintiffs, and he ordered Haywood, the Prothonotary, to enter it. And the apprentice said, May it please your lordship to show us, for our learning, the causes of your judgment. And CATLINE said, It seems to us that the affection of the said Andrew for the provision of the heirs males which he should beget, and his desire that the land should continue in the blood and name of Baynton, and the brotherly love which he bore to his brothers, are sufficient considerations to raise the uses in the land. And where you said in your argument *Naturæ vis maxima*, I say, *Natura bis maxima*, and it is the greatest consideration that can be to raise a use. But as to the other consideration moved in the argument, viz. of the marriage had between Edward Baynton and Agnes, the record does not prove this, nor is it so averred, and it shall not be so intended, and therefore I don't regard it, but the other causes and considerations are effectual, and those which moved us to our judgment. Wherefore judgment was given as follows.¹

TAYLOR v. VALE.

QUEEN'S BENCH. 1589.

[Reported Cro. El. 166.]

REPLEVIN. The case was upon demurrer. Vale having a rent charge in fee by indenture, which was enrolled within six months, giveth and granteth it to Hall in fee, and there was no attornment.

NOTA. In truth the case was, that he for a certain sum of money giveth, granteth, and selleth the rent, &c. But it was pleaded only, that he by indenture *dedit et concessit*.

¹ [Then follows the record of the entry of the judgment sustaining the demurrer.]

And it was ruled without any argument, that the rent without attornment passeth not, being only by way of grant, and not of bargain or sale; although the deed was enrolled. But WRAY [C. J.] said, that if by indenture, in consideration of a certain sum of money, *dedit et concessit* and the deed is enrolled, this shall pass the rent without attornment, though there be no words of bargain and sale. And the plaintiff had judgment.

CALLARD v. CALLARD.

QUEEN'S BENCH AND EXCHEQUER CHAMBER. 1593.

[Reported Moore, 687.]

IN *ejectione firmæ*, on a demise by Eustace Callard. And on not guilty pleaded it was found by special verdict that Thomas Callard was seised in fee, and in consideration of the marriage of Eustace, his son and heir apparent, being on the land, spoke these words to the said Eustace, viz. "Eustace, stand forth. I do here, reserving an estate for my own and my wife's life, give unto thee and to thine heirs for ever those my lands and [*sic*] Barton of Southcot." And afterwards Thomas enfeoffed Richard, who was the defendant, being his younger son in fee, with warranty and died. Eustace entered and demised it to the plaintiff, who entered, and the defendant ejected him. On which special verdict, on long debate in the Queen's Bench, judgment was given for the plaintiff, on which the defendant brought a writ of error in the Exchequer Chamber, and here the judgment was reversed at Hilary Term, 39 Eliz. [1597]. Note that in the Queen's Bench POPHAM [C. J.] held strongly that the consideration of blood raised a use to Eustace without writing, and so he had the possession by St. 27 Hen. VIII. But GAWDY, FENNER and CLENCH [JJ.], *contra* to this opinion; yet on the final judgment they agreed, because they took the words to amount to a feoffment with livery, being on the land, and the use to be to the feoffor and his wife for life, and then to Eustace and his heirs. But note that in the Exchequer Chamber EWENS [B.] took the law in the same manner as the puisne judges in the Queen's Bench, and that the judgment ought to be affirmed for this cause; but he held, *contra* to POPHAM [C. J.], that the use could not arise without writing. BEAUMONT [J.] took it as a feoffment to Eustace in fee, and the reservation to the father and his wife void for repugnancy; and therefore he wished to have the judgment affirmed; and he also was against POPHAM [C. J.]. But all the other justices, viz. ANDERSON [C. J.], PERYAM and CLARKE [BB.], and WALMSLEY and OWEN [JJ.], all agreed, that there was no feoffment executed, because the intent was repugnant to the law, to wit to pass an estate to Eustace, reserving a particular estate to himself and his wife. And a use it could not be, because the purpose was not to

raise a use without an estate executed, but by an estate executed, which did not take effect, and they all agreed that if it was a use, yet it could not arise on natural affection without deed. Note that the witnesses who proved the words to the jury were attainted of perjury in the Star Chamber at Easter Term, 40 Eliz. [1598].

YELVERTON v. YELVERTON.

QUEEN'S BENCH. 1594.

[Reported Cro. El. 401.]

UPON demurrer the case was, The father covenanted by indenture, in consideration of natural affection, to stand seised of all his lands which he had, and which he afterward should purchase, to the use of himself for life, and after to his youngest son and his heirs; afterwards he purchased land and died: and, Whether the eldest or youngest son should have it? was the question. — BACON argued for the youngest son, that he should have it; for this covenant shows his intent expressly, and is to work *in futuro*; and therefore good enough: as if a man deviseth lands which he hath not, and after purchaseth them: so if one covenants that he will purchase lands before *Michaelmas*, and that before *Easter* following he will levy a fine of those lands which shall be to such uses, and he levies a fine, and doth not limit any uses, it shall be according to the covenant before the purchase (*quod fuit concessum PER CURIAM*); for they shall be as uses declared upon that fine whereof he showed his intent before. — But in the principal case all THE COURT held, that this covenant vests nothing in the younger son, and is not sufficient to vest any use in him of this land; for a man cannot by a covenant raise an use out of land which he hath not; for no more than a man may charge, let, or grant a thing which he hath not, no more may he limit an use out of land which he hath not. Also upon every feoffment or purchase, the feoffor or donor from whom the land passeth is to limit the uses to the feoffee or purchaser; then before the purchase one cannot limit how the use shall be, *viz.* that it shall be to his youngest son, where the feoffor hath limited it to the use of him and his heirs; which should be to limit an use out of an use, which the law will not suffer: therefore judgment was given accordingly for the eldest son. And here a case was cited in 20. *Eliz.* (but neither the name nor in what court was mentioned) that a mortgagor intreated a stranger to redeem the land at the day; and covenanted by indenture, that after such redemption the stranger should have the land to him and his heirs; and that he in consideration of such a sum would stand seised to the use of him and his heirs; the stranger redeems the land at the day, the mortgagor enters, the deed is enrolled within the six months: yet ruled that nothing passed; because he had not any estate or interest therein at that time to contract for it.

WARDE *v.* TUDDINGHAM.

KING'S BENCH. 1605.

[*Reported 2 Roll. Ab. 783, pl. 5.*]

CONSIDERATION of ancient acquaintance, or of being chamber-fellows or entire friends, will not raise any use. Agreed by the court.

BACON, USES, 13, 14. I would have one case showed by men learned in the law, where there is a deed, and yet there needs a consideration; as for parol, the law adjudgeth it too light to give action without consideration; but a deed ever in law imports a consideration, because of the deliberation and ceremony in the confection of it; and therefore in 8 Regiⁿ*æ* it is solemnly argued, that a deed should raise an use without any other consideration. In the Queen's case a false consideration, if it be of record, will hurt the patent, but want of consideration doth never hurt it; and yet they say that an use is but a nimble and light thing; and now, contrariwise, it seemeth to be weightier than any thing else: for you cannot weigh it up to raise it, neither by deed, nor deed enrolled, without the weight of a consideration; but you shall never find a reason of this to the world's end, in the law: But it is a reason of chancery, and it is this:

That no court of conscience will enforce *donum gratuitum* though the intent appear never so clearly, where it is not executed, or sufficiently passed by law; but if money had been paid, and so a person damnified, or that it was for the establishment of his house, then it is a good matter in the chancery.

LUTWICH *v.* MITTON.

COURT OF WARDS. 1620.

[*Reported Cro. Jac. 604.*]

It was resolved by the two Chief Justices, MONTAGUE and HOBART, and by TANFIELD, Chief Baron, that upon a deed of bargain and sale for years of lands whereof he himself is in possession, and the bargainee never entered; if afterwards the bargainors make a grant of the reversion (reciting this lease) expectant upon it to divers uses, that it is a good conveyance of the reversion; and the estate was executed and vested in the lessee for years by the statute; and was divided from the reversion, and not like to a lease for years at the common law; for in that case there is not any apparent lessee until he enters; but here, by operation of the Statute, it absolutely and actually vests the estate

in him, as the use, but not to have *trespass* without entry and actual possession: wherefore they would not permit this point to be further argued.

BARKER v. KEETE.

COMMON BENCH. 1678.

[Reported *Freem.* 249.]

THE case was: Edward Hudson being tenant in tail, remainder to William, his brother, to make a tenant to a *præcipe* to suffer a recovery, makes a lease to one Pepes for six months, and upon that a release, and then suffers a recovery. The plaintiff claimed under the remainder-man.

The question was only upon the lease for six months, the words being, that he did "demise, grant, and to farm let, the lands in question to Pepes, *habend'* for six months, rendering a pepper-corn, if demanded."

The question was, whether this pepper-corn rent was a sufficient consideration to make the lease operate by virtue of the statute, so that the lessee should be said to be in possession, so as to be capable to take a release before entry?

For it was agreed by all, if it did operate only as a lease at common law, that the party was not capable of taking an enlargement of his estate by a release until actual entry, according to 1 Inst. 46.

1. And it was argued by *Stroud*, that this is only a lease at common law; for the words "demise, grant, and to farm let," are words used at the common law; and there is no word of consideration, nor of bargain and sale, in the deed, so that it cannot be intended that the parties meant that it should operate by way of use.

2. This is an executory consideration, and it is also contingent; for this rent of a pepper-corn is not to be paid, unless it be demanded, which is uncertain whether it will or not; besides, it is not payable presently, and a future consideration shall never raise a present use; and that is the reason of the *Lord Paget's Case*, Moor. 194; 1 Co. 154; 1 Leon. 194; no use did rise there, because the consideration of payment of his debts was executory, and was no present consideration. *Vide* Cro. Eliz. 378; 6 Co. 15.

3. The consideration of a pepper-corn is of no value to raise an use; and therefore if an infant make a lease, rendering a pepper-corn, it is a void lease. 43 Ed. 3; Fitz. Entr. 26.

But as to this point all the court, except NORTH, C. J., did incline, that this lease did operate by the Statute.

For, as to the first objection, they said, it had been often adjudged, that, though there were not the words "bargain and sell," yet it

would operate by way of use, there being a sufficient consideration. 8 Co. 93.

2. As to the second objection, they held, that though this rent was to be paid futuramente, yet it was a present duty; and the obligation to pay it was present, for "yielding and paying" makes a covenant. And NORTH said, that where things are done in the same instant, they would transpose them, and suppose a precedency, it being to support common assurances; and so they might suppose the covenant to pay the rent to precede the raising of the use, and then the consideration would be executed.

And NORTH said, he had known it ruled several times, that a lease and release in the same deed was a good conveyance, for priority should be supposed.

3. As to the third they all held, that the value of the consideration was not material; for it is usual, if an estate be of the value of £1,000 *per annum*, to make 5s. the consideration in a bargain and sale for a year; and by *Porter's Case*, 1 Co. 24, a penny is sufficient to alter the use of a feoffment, and to cause the feoffee to be seised to his own use; and so in the case of *Sutton's Hospital*, 10 Co. 84.

And as to the lease of an infant, reserving a pepper-corn, that shall be a void lease, because it appears to the court, that there is no proportionable consideration.

And NORTH said, that if there had appeared any intent of the parties, that it should operate by way of use, he should not have doubted of the case, but the intent ought to appear; and he said, in the case of *Garnish v. Wentworth*, tried before the Lord Chief Justice Bridgman, a conveyance was endeavoured to be set up by a covenant to stand seised, by reason that the party was related to him that made it, though it were nine degrees off; and Bridgman said in that case, it were worthy of consideration, whether the use should rise, because the party that made it did not know of the relation, and so could not intend it. But that point was not determined, because upon examination it appeared, that there was no relation in the case.

And in the case of *Rigby and Smith*, Cro. Car. 529, though the express consideration be natural love to his children, yet the party being his brother, to whom the conveyance was made, and part of the consideration being to settle his lands in his blood, though that particular relation was not named, it was well enough, because it seemed to be pointed at. *Vide* 7 Co. 39.

And they said, that the very tenure was sufficient to change an use, or at least to keep it from resulting; and therefore, if a lease be made without consideration, or reservation of rent, the use shall not result, as it shall in case of a feoffment, because there is no tenure.

And WYNDHAM said, that although it might not be a consideration to raise an use of a freehold, where the deed is to be enrolled, because by the Statute it is to be a valuable consideration, yet it might serve in case of a lease for years.

And whereas it was objected, that it ought to be money for the consideration, it was said, though it should not pass by bargain and sale, yet the use might rise by a covenant to stand seised well enough.

And NORTH said, that if the truth of this case had been found, there would have been no question in it; for this recovery was to support a mortgage, though it was not so found, and that would have been a sufficient consideration.

And NORTH said, that this conveyance by lease and release was first invented by Sir Francis More, for formerly they used to make a lease, and the lessee used to go and enter, and the same day they made the release.

Another point was stirred, viz., that in case there were no good tenant to the *præcipe*, yet he in remainder being heir to the tenant in tail, should be estopped, according to the opinion of Plow. *Manxell's Case*; but that opinion of Plow. was denied by the court, according to 3 Co. 6; for if that were law, then there need never be any lawful tenant to the *præcipe*, which the law requires; because by the judgment the tenant is to be turned out of possession; and though all are estopped that claim under the parties to the recovery, yet the issue in tail and the remainder are not, because they claim paramount from the donor.

Another point was, here being a special conclusion made, whether the judges should be bound by this special conclusion of the verdict; for it was held in the case of *Lane v. Cooper*, Moore's Reports, that they should not; but it is said, and so held, that since that the law had been held contrary. 5 Co. 95; 2 Roll. 701.¹

ROE v. TRANMER.

COMMON PLEAS. 1757.

[Reported 2 Wils. 75.]

EJECTMENT for lands in Yorkshire. Upon the trial of this cause it appeared in evidence, that Thomas Kirby being seised in fee of the lands in question made and executed certain deeds of lease and release. The lease dated November 9, 1733, made between the said Thomas Kirby of the one part, and Chr. Kirby his brother of the other part, whereby it is witnessed that the said Thomas Kirby, in consideration of 5s. did grant, bargain and sell to the said Chr. Kirby, his executors, administrators and assigns, the lands in question; to have and to hold the same unto the said Chr. Kirby, his executors, administrators and assigns, from the day before the date thereof for the term of one year under a pepper-corn rent, to the intent that by virtue of these presents,

¹ s. c. 2 Mod. 249.

and by force of the Statute for transferring uses into possession, he the said Christopher may be in the actual possession of all the premises, and be enabled to take and accept of a grant and release of the reversion and inheritance thereof to them and their heirs, to, for and upon such uses, intents and purposes, as in and by the said grant and release shall be directed or declared. In witness, &c. executed by Thomas Kirby.

The release dated November 10, 1733, made between Thomas Kirby of the one part, and Chr. Kirby his brother of the other part, witnesseth that for the natural love he beareth towards his said brother, and for and in consideration of £100 to the said Thomas Kirby paid by the said Chr. Kirby, he the said Thomas Kirby hath granted, released and confirmed, and by these presents doth grant, release and confirm unto the said Chr. Kirby in his actual possession thereof now being, by virtue of a bargain and sale for one whole year to him thereof made by the said Thomas Kirby, by indenture dated the day next before the day of the date hereof, and by force of the Statute made for transferring of uses into possession, after the death of the said Thomas Kirby, all that one close, &c. (the premises without any words of limitation to the releasee;) To have and to hold the said premises unto the said Chr. Kirby and the heirs of his body lawfully begotten, and after their decease to John Wilkinson, eldest son of my well-beloved uncle John Wilkinson of North Dalton in the county of York, gentleman, to him and his heirs and assigns, and to the only proper use and behoof of him the said John Wilkinson the younger, his executors, administrators or assigns for ever, he the said John Wilkinson the younger paying or causing to be paid to the child or children of my well-beloved brother Stephen Kirby the sum of £200, and for want of such child or children, then to the child or children of my well-beloved sister Jane Kirby, and for want of such issue, then to the younger children of my well-beloved uncle John Wilkinson of North Dalton aforesaid, and for want of such younger children, then the said estate above-mentioned to be free from the payment of the above-named sum of £200. Then the releasor covenants that he is lawfully seised in fee, and that he hath good right and full power to convey the premises to the said Chr. Kirby, and also that it may and shall be lawful to and for the said Chr. Kirby, or the said John Wilkinson the younger, from and after the death of him the said Thomas Kirby, peaceably and quietly to have, hold, use, occupy, possess and enjoy the said messuage, lands and premises, with the appurtenances, not only without the lawful let, suit, &c. of him the said Thomas, but all others claiming under him, &c. free from all incumbrances. Then it is covenanted by all the parties, that all fines and recoveries and deeds of the premises levied, suffered or executed by the parties, or any of them, or by any other persons, shall be and enure to the use of the said Chr. Kirby and his heirs of his body lawfully begotten, and for want of such issue, then to the use of the said John Wilkinson junior, his heirs and assigns for ever, according to the

true intent of these presents. In witness, &c. executed by Thomas Kirby.

It further appeared in evidence, that Chr. Kirby on the 10th of November, 1733, paid to the said Thomas Kirby £20 in money, and gave him his note for £80 payable to the said Thomas Kirby, who signed a receipt on the backside of the said deed of release in these words, viz. Received the day and year within written of the within named Chr. Kirby the sum of one hundred pounds, being the full consideration-money within mentioned to be paid to me. I say received by me Thomas Kirby. Witness, M. J. S. T.

It further appeared in evidence that Chr. Kirby died without issue in 1740, and that John Wilkinson the lessor of the plaintiff is the same John Wilkinson named in the deed of release, but it did not appear that the said John Wilkinson had notice of the said deeds of lease and release until a short time before this ejectment was brought.

This being the case for the consideration of the court, the general question is, whether the lessor of the plaintiff has a title to recover upon the lease and release.

It has been argued at the bar three times, the first time by Serjeant *Willes* for the lessor of the plaintiff, and Serjeant *Poole* for the defendant, and the second and third times (because of a new judge) by Serjeant *Hewit* for the plaintiff, and *Sir Samuel Prime*, the king's first serjeant, for the defendant.

After time taken to consider, the court were all of opinion that the release was void as a common law conveyance, it being to convey a freehold to commence *in futuro*, but that it should have the effect and operation of a covenant to stand seised to uses; and in Hilary term 31 Geo. 2, Lord Chief Justice WILLES gave the judgment of the whole court for the plaintiff.

WILLES, C. JUSTICE. It is admitted and agreed on all hands that this deed is void as a release, because it is a grant of a freehold to commence *in futuro*; and therefore the only question is, whether it shall take effect as a covenant to stand seised to uses; and we are all of opinion that it shall (my brother Bathurst, not being here, authorized me to say he is of the same opinion).

Many cases have been cited on both sides, some of which are very inconsistent with one another, and to mention them all would rather tend to puzzle and confound, than to illustrate the matter in question; and therefore I shall only take notice of those things we think most material, and of some few cases nearest in point for our judgment.

It appears from the cases upon this head, in general, that the judges have been *astuti* to carry the intent of the parties into execution, and to give the most liberal and benign construction to deeds *ut res magis valeat quam pereat*. I rely much upon Sheppard's Touchstone of Common Assurances, 82, 83 (which is a most excellent book), where he says, when the intent is apparent to pass the land one way or another, there it may be good either way.

By the word *intent*, is not meant the intent of the parties to pass the land by this or that particular kind of deed, or by any particular mode or form of conveyance, but an intent that the land shall pass at all events one way or other.

Lord Hobart (who was a very great man) in his Reports, fo. 277, says: "I exceedingly commend the judges that are curious and almost subtil (*astuti*) to invent reason and means to make acts according to the just intent of the parties, and to avoid wrong and injury, which by rigid rules might be wrought out of the Act;" and my Lord Hale in the case of *Crossing* and *Scudamore*, 1 Vent. 141, cites and approves of this passage in Hobart.

Although formerly, according to some of the old cases, the mode or form of a conveyance was held material, yet in later times, where the intent appears that the land shall pass, it has been ruled otherwise; and certainly it is more considerable to make the intent good in passing the estate, if by any legal means it may be done, than by considering the manner of passing it, to disappoint the intent and principal thing, which was to pass the land.¹ *Osman* and *Sheafe*, 3 Lev. 371. Upon this ground we go.

We are all of opinion that in this case there is every thing necessary to make a good and effectual covenant to stand seised to uses. First, here is a deed. Secondly, here are apt words, the word *grant* alone would have been sufficient, but there are other words besides, which are material, viz. A covenant that the grantor has power to grant, and a covenant that all fines, recoveries, &c. of these lands shall enure to the uses in the deed. Thirdly, the covenantor was seised in fee. Fourthly, here appears a most plain intent that Wilkinson the lessor of the plaintiff should have the lands in case Chr. Kirby died without issue. And lastly, here is a proper consideration to raise an use to the lessor of the plaintiff, for the covenantor in the deed names him to be the eldest son of his well-beloved uncle; these are all the circumstances necessary to make a good deed of covenant to stand seised to uses.

In support of their opinion the Ch. Justice only cited and observed upon these cases, viz. *Crossing* and *Scudamore*, 1 Mod. 175; 2 Lev. 9; 1 Vent. 137; *Walker* and *Hall*, 2 Lev. 213; *Coultsman* and *Senhouse*, Tho. Jones, 105; Carth. 38, 39; *Baker* versus *Hil.*, 2 W. & M. B. R.; *Osman* and *Sheafe*, 3 Lev. 370.

The C. Justice lastly cited two of the strongest cases mentioned for the defendants, as *Hore* and *Dix*, 1 Sid. 25; *Samon* and *Jones*, 2 Vent. 318, and said he did not (for his own part) understand them, and that if he had sat in judgment in those cases, he should have been of a different opinion in both; however, he said the present case differed from these two cases. Lastly, he said the whole court were clear of opinion that a man seised, might covenant to stand seised to the use

¹ "In conveyances we are to respect two things, the form, and the effect of it; and in all cases where the form and the effect can not stand together, the form shall be rejected, and the effect shall stand." — HARPER, J., in *Brent's Case*, 2 Leon. 14, 17.

of another person after the covenantor's death. *Postea* delivered to the plaintiff.

LEASE AND RELEASE. "It was not long, however, before a loophole was discovered in this latter Statute [St. of Enrolment], through which, after a few had ventured to pass, all the world soon followed. It was perceived that the Act spoke only of estates of inheritance of freehold, and was silent as to bargains and sales for a mere term of years, which is not a freehold. A bargain and sale of lands for a year only, was not therefore affected by the Act, but remained still capable of being accomplished by word of mouth and payment of money. The entry on the part of the tenant, required by the law, was supplied by the Statute of Uses; which, by its own force, placed him in legal intendment in possession for the same estate as he had in the use, that is, for the term bargained and sold to him. And as any pecuniary payment, however small, was considered sufficient to raise a use, it followed that if A., a person seised in fee simple, bargained and sold his lands to B. for one year in consideration of ten shillings paid by B. to A., B. became, in law, at once possessed of an estate in the lands for the term of one year, in the same manner as if he had actually entered on the premises under a regular lease. Here then was an opportunity of making a conveyance of the whole fee simple, without livery of seisin, entry or enrolment. When the bargain and sale for a year was made, A. had simply to release by deed to B. and his heirs his (A.'s) estate and interest in the premises, and B. became at once seised of the lands for an estate in fee simple. This bargain and sale for a year, followed by a release, is the modern conveyance by lease and release, — a method which was first practised by Sir Francis Moore, serjeant at law, at the request, it is said, of Lord Norris, in order that some of his relations might not know what conveyance or settlement he should make of his estate; and although the efficiency of this method was at first doubted, it was, for more than two centuries, the common means of conveying lands in this country. It will be observed that the bargain and sale (or lease, as it is called) for a year derived its effect from the Statute of Uses; the release was quite independent of that Statute, having existed long before, and being as ancient as the common law itself. The Statute of Uses was employed in the conveyance by lease and release only for the purpose of giving to the intended releasee, without his actually entering on the lands, such an estate as would enable him to receive the release. When this estate for one year was obtained by the lease, the Statute of Uses had performed its part, and the fee simple was conveyed to the releasee, by the release alone. The release would, before the Statute of Uses, have conveyed the fee-simple to the releasee, supposing him to have obtained that possession for one year, which, after the Statute, was given him by the lease. After the passing of the Statute of Frauds, it became necessary that every bargain and sale of lands for a year should be put into writing, as no pecuniary rent was ever reserved, the consideration being usually five shillings, the receipt of which was acknowledged, though in fact it was never paid. And the bargain and sale, or lease for a year, was usually made by deed, though this was not absolutely necessary. It was generally dated the day before the date of the release, though executed on the same day as the release, immediately before the execution of the latter." Wms. Real Prop. (13th ed.) 187-189.

SECTION V.

LIMITATION OF USES AND OPERATION OF THE STATUTE.

ANONYMOUS.

COMMON PLEAS. 1582.

[Reported 18 Cro. El. 46.]

NOTA that *cestui que use*, at this day, is immediately and actually seised and in possession of the land; so as he may have an assise or trespass before entry against any stranger who enters without title, and this by the words of the 27 Hen. 8, c. 10, viz., "that *cestui que use* shall stand and be seised," &c.; and this was the opinion of divers justices.

GILBERT, USES, 73. The design of this law was utterly to abolish and destroy that pernicious way of conveyance;¹ and the means they took to do it was to make the possession fall in with the use in the same manner as the use was limited; and where they were all freeholds, it is thought they would be then subject to the rules of common law; but the method has not answered the legislature's intent; for it has introduced several sorts of conveyances quite opposite to the rules of common law; for now wherever a use is raised, the statute gives *cestuy que use* the possession; so that 'tis only necessary to form a use, and the possession passes, without any livery or record at all,

¹ (NOTE by Sugden in 3d ed.). — Bacon supports at length the contrary opinion and upon grounds which appear to be unanswerable. Uses, p. 39; and see Dy. 362, b, pl. 31. The object of the statute was to turn equitable into legal estates — beyond this the legislature does not appear to have been solicitous to provide, although from the prevalence of bargains and sales, they afterwards, for the sake of notoriety, required them to be by indenture enrolled. — The intention of the statute of uses was evaded not by the continuance of the same mode of conveyance, but by equity upholding uses under the name of trusts. The statute of enrolment was, in a great measure rendered a nullity, by the introduction of the conveyance by lease and release, which will form the subject of a future note; see Hargr. n. (3) Co. Litt. 48, a. So that now, as Lord C. J. Vaughan observed, the principal use of the statute of 27, is not to bring together a possession and use, which at *no* [qu. at one] time were separate the one from the other, but to introduce a general form of conveyance by which persons may execute their intents and purposes at pleasure, either by transferring their estates to strangers, by enlarging, diminishing, or altering them to and among themselves at their pleasure, without observing that rigour and strictness of law for the possession, as was requisite before the statute; Vaugh. 50. Lord Hardwicke has observed, that by means of *trusts* this statute made upon great consideration, introduced in a solemn and pompous manner, has had no other effect than to add, at most, three words to a conveyance; 1 Atk. 591. It is inaccurate to say, that the statute introduced several sorts of conveyances (see the text). The old conveyances continued, but had a *legal* operation given to them by the statute.

and the reversions, without the attornment of particular tenants; and how the other purposes of the statute be evaded will after appear.

BACON, USES, 47. The matter and substance of the estate of *cestuy que use* is the estate of the feoffee, and more he cannot have; so as if the use were limited to *cestuy que use* and his heirs, and the estate out of which it was limited was but an estate for life, *cestui que use* can have no inheritance.¹

SANDERS, USES (5th ed.), 106. Vested remainders or reversions may be legally granted; and consequently uses may be limited upon the seisin so transferred in remainder or reversion; but consistently with the rule just noticed, as contingent remainders, or rents already granted to take effect upon a contingency, cannot be transferred at law during the suspense of the contingency, it follows, that no use can be limited upon the transfer of such contingent remainder or rent. The statute transfers the legal possession or estate to the use; but a seisin, not legally vested, cannot serve a use.

Ibid., 134. It was absurd, that a man should make a conveyance, or give possession by livery of seisin, to himself; and therefore if a feoffment had been made to a stranger and the feoffor, the stranger took the whole. But now, if a feoffment be made to the use of the feoffor, or to the use of the feoffor and a stranger, it is a good limitation of the use, and the statute executes it in the feoffor alone in the first instance, and in him and the stranger in the second. As this manner of limiting the use to, and vesting the legal estate in the feoffor, releasor, &c., by one and the same conveyance, is quite contrary to the simple mode of conveyancing adopted by the common law, so it is the more convenient and the less expensive method. Thus, for example, it frequently happens, that upon the death or removal of the trustees, it becomes necessary to fill up their number pursuant to a power for that purpose, usually introduced into settlements of real property. In order to effect this, it is now the practice for the old trustees to make a conveyance, which operates by way of transmutation of possession (generally by lease and release) unto the new trustees and their heirs, to the use of the old and new trustees and their heirs. Without the assistance, therefore, of the Statute of Uses, it would have been necessary in the above case, that the old trustees should have first enfeoffed A. B., who would have re-enfeoffed the old and new trustees jointly; thereby making two conveyances necessary. Indeed, in the case of terms of years and other personal property, two assignments are still required for the above purpose.

¹ See Gilbert, Uses, 297; Cruise, Uses, 96; *Meredith v. Joans*, Cro. Car. 244.

MILDMAY'S CASE.

COURT OF WARDS. 1582.

[Reported 1 Co. 175.]

THE case in an information exhibited in the Court of Wards by Richard Kingsmill, Esq. attorney of the same court, against the Lady Anne Sharington, late wife of Sir Hen. Sharington, Knt. and John Talbot, Esq. and Oliff his wife, one of the daughters and heirs of the said Sir Henry Sharington, which was resolved Hil. 24 Eliz. and afterwards Hil. 26 Eliz. adjudged in the Court of Common Pleas, rot. 745, between Anthony Mildmay, Esq. plaintiff, and Roger Standish, Gent. defendant, in an action upon the case for slandering his title, &c. which judgment was M. 26 & 27 Eliz. rot. 35, affirmed in the King's Bench, in a writ of error, and was in effect thus: The said Sir Henry Sharington having a wife the said Dame Anne, and three daughters, Grace married to the said Anthony Mildmay, Ursula married to Thomas Sadler, Esq. and Oliff married to the said John Talbot, by indenture bearing date 20 Augusti 15 Eliz. made between the said Sir Henry Sharington of the one part, and Edmund Pirton and James Paget, Esqrs. of the other part, in consideration of a jointure for his wife, for the advancement of his issue male of his body, if he should have any, and for the advancement of his said three daughters and the heirs of their bodies, if he should have no heir male of his body, and for the continuance of his land in his blood, and for other good and just considerations did covenant to stand seised of six hundred acres of land (*exempli gratia*) to the uses, intents, and purposes, and under the proviso following, *scil.* of all to the use of himself for his life, and after for 300 acres of land, in certain, to the use of his wife for her life for her jointure; and of the other 300 acres after his death, and of the said 300 acres limited for the jointure of the wife after their deaths to the use of the heirs males of his body begotten; and for default of such issue, then for the 300 acres not being limited for jointure, &c. to the use of his three daughters severally by themselves, and to the heirs of their bodies; and for default of such issue, to the use of the right heirs of the said Sir Henry, with like limitation of the other 300 acres to them of the like estate, with the reversion to his right heirs. And if any of his said three daughters should die without issue, then her portion should be by moieties to the survivors of the like estate, *ut supra*, with remainder *ut supra*; with proviso for the three several husbands of the said three daughters to have several portions for their lives, if they should survive their wives, and should not be entitled to be tenants by the curtesy, with this proviso in these words following, *scil.* Provided always, and it is covenanted and agreed between all the said parties, that it shall be lawful for the said Sir Henry by his will in

writing to limit any part of the said lands to any person or persons for any life, lives, or years, for the payment of his debts, performing of his legacies, preferment of his servants, or any other reasonable considerations as to him shall be thought good, and all persons thereof seised, to stand seised thereof to the use of such persons and for such interests as shall be so limited by his will. After which the said Ursula died without issue, Grace and Oliff surviving, whereby her portion by moieties came to them: and afterwards the said Sir Henry by his will in writing for the advancement of his daughter Oliff, and of her husband, and of the heirs of the body of the said Oliff, limited a great part, limited by the indenture for the portion of Grace, after the death of his wife, and another great part of land which remained to her by the death of the said Ursula, to the said Oliff and her husband, and to the heirs of the body of Oliff for 1000 years without reservation of any rent; and afterwards the said Sir Henry died without issue male, and whether this limitation for 1000 years being made for the advancement of his daughter Oliff and her husband, and the heirs of the body of the said Oliff, be good in law by force of the said proviso, was the question. And it was resolved and adjudged by Sir CHRISTOPHER WRAY, Ch. Just. of England, Sir EDM. ANDERSON, Ch. Just. of the Court of Common Pleas, and all the judges of England, that the limitation for 1000 years was void, and not warranted by the said proviso; and in this case five points were resolved.

First, that an use cannot be raised by any covenant or proviso, or by bargain and sale upon a general consideration; and therefore, if a man by deed indented and enrolled according to the Stat. for divers good considerations bargains and sells his lands to another and his heirs, *nihil operatur inde*; for no use shall be raised upon such general consideration, for it doth not appear to the court that the bargainer hath *quid pro quo*, and the court ought to judge whether the consideration be sufficient or not; and that cannot be when it is alleged in such generality. But note reader, the bargainee in such case may aver that money or other valuable consideration was paid or given, and if the truth be such, the bargain and sale shall be good. So if I by deed covenant with J. S. for divers good considerations, that I and my heirs will stand seised to the use of him and his heirs, no use without a special averment shall be raised by it; but if J. S. be of my blood, and in truth the covenant was made for the advancement of his blood, he may aver that the covenant was in consideration thereof; for in both these cases the person who shall take the use is certain; and that such averment may be taken which stands with the deed, although it be not expressly comprised in the deed, is proved by a case adjudged in an assize between *Villers* and *Beamont*, term. Pasch. 3 & 4 Ph. & M. reported by Bendloes, serjeant at law; which case you will find also Pasch. 3 & 4 Ph. & M. Dy. fo. 146, where the case in effect was, that George Beamont and Jane his wife, as in the right of his wife, were seised of the manor of Northall, &c. and had issue Will. Beamont, who

had issue Rich. Beamont, and he and his wife, by indenture 12 H. 8, between them of the one part, and Rich. Clark of the other part, in consideration of £70 given by Rd. Clark, did bargain and sell the land to the said Rich. Clark for 30 years, the remainder to themselves for their lives, the remainder to Will. Beamont for life, the remainder to Rich. Beamont and to one Collet the daughter of Rd. Clark in tail, &c. and afterwards a recovery was had to the same uses; Rd. Beamont and Collet did intermarry; and it was found and averred, that the said indenture was made, and the said recovery had *tam in consideratione maritagii præd' inter Rich' Beamont & Colletam, habend' & celebrand'* (to make it a jointure within the Statute of 11 Hen. 7) *quam* of the said sum of £70, and it was adjudged, that although there was a particular consideration mentioned in the deed, yet an averment in the same case might be made of another consideration which stood with the indenture, and which was not contrary to it; *a fortiori* in the said cases, for in the deed there is no certain consideration, but the deed is general for divers good considerat. then the averment that the bargainee gave money, &c. or that the covenantee was of his blood, is but an explanation and particularizing of the general words of the deed, which include every manner of consideration, and in all the said cases the matter so averred is traversable and issuable.

Secondly, it was resolved, that when uses are raised by covenant in consideration of paternal love, &c. to his sons and daughters, or for the advancement of any of his blood; and after in the same indenture a proviso is added, that the covenantor for divers good considerat. may make leases for years, &c. that the covenantor in such case cannot make a lease for years to his son or daughter, or to any other of his blood (much less to any other person) because the power to make leases for years was void when the indenture was sealed and delivered; for the covenant upon such general consideration cannot raise the use for the causes afores. and no particular averment can be taken because his intent was as general as the consideration was, and his intent was not at the time of the delivery of the deed to demise to any person in certain, to one more than another, but to demise generally to whom he pleased; and therefore his power to make leases (the uses being created and raised by covenant upon the considerations aforesaid) was void *ab initio*. But if the uses had been limited upon a recovery, fine or feoffment, in that case there needs not any consideration to raise any of the uses, and so a manifest difference. And the case at bar is stronger, because the proviso which gave power to make leases will defeat or at least incumber the estates vested and settled upon good considerations in strangers by the covenants of the same indenture. So note a difference when the consideration is general, and the covenant or bargain made with a person certain, there an averment according to the truth of the case may be taken as aforesaid; but when the consideration is general, and the person uncertain, there no averment can help: and therefore if I for divers good considerations covenant

with you, that I will stand seised to the use of such a one as you shall name, now although you name my son, or my cousin, yet no use shall be raised thereby, because, for the generality and uncertainty, it was void *in initio*, and never could be made good to any purpose after; and no averment can make it good, or reduce it to any certainty, for the intent of the covenantor was as general as his words were. But if I covenant with you that in consideration of fatherly love, or for the advancem. of my blood, I will stand seised to the use of such of my sons, or to the use of such of my cousins as you shall name, upon the nomination made the use shall be raised, for there the consideration is particular and certain, and the person by matter *ex post facto* may be made certain. 3. Upon these words in the proviso (other considerations) it was held, that this word (other) could not comprehend any consideration mentioned or expressed in the indentures before the proviso; for (other) ought to be other in nature, quality, and person, and the advancement of his daughter is the consideration mentioned before. 4. It was resolved, that the said limitation of 1000 years was as well against the intent of the parties, as against the words of the proviso, for the intent and scope of the indentures was to make distribution of his lands amongst his three daughters, and the heirs of their bodies; and every of them, upon good consideration and by agreement between their parents, had her portion by herself; but if this limitation for 1000 years should be good, it would rather frustrate the estate of the other sister, and defraud the intent of the parties grounded upon a consideration of marriage, than perform and pursue the intent and meaning of the proviso, for the intent of the proviso was never to give any power to make void the estates of the other sisters; but it appears by all the parts of the indenture, that each daughter should be advanced equally; and so this limitation for 1000 years without any rent reserved was against the intent and meaning of the parties; it seems also to be against the words of the proviso, for that cannot be called a reasonable consideration which tends to the subversion of the estates vested and settled by the said indentures upon so good and just considerations against the meaning of the parties. After the said resolution of the justices certified into the Court of Wards, it was adjudged in the Common Pleas, and also affirmed upon a writ of error in the King's Bench in an action upon the case brought by the said Anthony Mildmay against Roger Standish, because the said Roger had said, and openly published that the said land was lawfully assured to the said John Talbot and Oliffe his wife for 1000 years, and that they were lawfully possessed of the interest of the said term, whereas, in truth the said land was not lawfully assured for the term afores. nor were the said John Talbot and Oliffe lawfully possessed of the interest thereof, and so for slandering of the estate and title which was conveyed to his wife by the said indentures, and showed all in certainty, and how he was prejudiced by the said words, he brought the said action. And Standish pleaded the

said proviso in the same indentures, and the said limitation for 1000 years by the said will, &c. according to the said proviso (as he pretended) by virtue whereof he said the said Oliffe had an interest for 1000 years, and justified the words upon which the plaintiff demurred. And it was adjudged, that the action upon the case was maintainable: and in this case two points were resolved in both the courts: first, that the said lease for the causes afores. was void in law. Secondly, although *de facto* the said John Talbot and Oliffe had a limitation of the land by the said will of Sir Henry Sharrington in writing for 1000 years, which was the occasion that Standish, being a man not learned in the law, did affirm and publish that Oliffe had a term for 1000 years; yet forasmuch as he hath taken upon him the knowledge of the law, and meddling with a matter which did not concern him, had published and declared, that Oliffe had a good estate for 1000 years, in slander of the title of Mildmay, and thereby had prejudiced the plaintiff, as appears by the plaintiff's declaration; for this reason the judgment given for the plaintiff was affirmed in the writ of error; *et ignorantia juris non excusat.*

EGERTON'S CASE.

KING'S BENCH. 1619.

[Reported Cro. Jac. 525.]

ERROR upon a judgment in the Common Pleas in a writ of covenant. Two errors were assigned. First. For that a fine being levied by indenture, declared the use to be to the wife of J. S., and the Court of Common Pleas adjudged it to be an estate for life, whereas it is not so expressed. And as to that point the judgment was affirmed, for DOWERIDGE said, although the fine be but as a grant, yet an estate for life may pass. *Vide* 1 Co. 106, *Shelly's Case*.¹

LEAKE, DIGEST OF LAND LAW, 112, 113. The limitation of uses is not restricted by the doctrines of common law concerning the seisin; and, therefore, a use for a freehold estate may be limited to arise *in futuro* or upon a contingency without any prior limitation to support it as a remainder. Thus a conveyance of the immediate legal possession may

¹ The decision on the other error assigned is omitted.

"And he [WALMESLEY, J.] said that if a man before the Statute of 27 Hen. 8 had bargained his land for money generally, without these words, 'his heirs,' the Chancellor would oblige him, according to conscience and the intent of the parties, in regard of the value, to have executed an estate in fee, and that was so long as uses were things merely in trust and confidence; but the uses since the Statute are transferred and made into an estate in the land; and therefore he said that if after the Statute he bargain and sells the land to one generally for money, he hath but an estate for life." *Corbet's Case*, 1 Co. 83 b, 87 b. (1600).

be made to the use of a person and his heirs, after four years, or after the death of the grantor, or to such uses as the grantor shall appoint by will. 1 Sanders on Uses, 136; Gilbert on Uses, by Sugden, 153, 161; *Clere's Case*, 6 Co. 18 a; *Davies v. Speed*, 2 Salk. 675, *per* Holt, C. J. So, a bargain and sale might be made to the use of another after four years; so, a covenant to stand seised to the use of another after the covenantor's death. *Roe v. Tranmer*, 2 Wils. 75; *Doe v. Prince*, 20 L. J. C. P. 223.

In all such cases of uses to arise *in futuro*, the use, being undisposed of except at the time or in the event specified, results or remains in the grantor or covenantor in fee simple as before, until the future use arises to displace it; the use does not result or remain for a particular estate only, so as to convert such limitations into remainders. Bacon on Uses, Rowe's ed., note (137); Gilbert on Uses, by Sugden, 161, 162; 1 Hayes Conv. 464, App. ii. 2, on Resulting Uses.

A future estate in the use may also be limited to take effect in substitution or defeasance of a previously limited estate, and even of an estate in fee simple; for the rules of common law, not admitting of any future limitations shifting the freehold except by way of remainder, nor of any limitations after an estate in fee simple, had no application to the use. A marriage settlement is a well-known instance of such limitations; where the use is first limited to the settlor in fee, and, upon the marriage taking place, then to the uses of the settlement. 1 Sanders Uses, 143; Gilbert on Uses, by Sugden, 153.

Future uses of the above kinds, including all such as are not limited by way of remainder, are called *springing or shifting uses*, the former term more especially denoting those that arise or spring up without any prior limitation; the latter denoting those that shift the use in substitution of a prior estate. Sugden's note to Gilbert on Uses, 152. Being executed by the Statute, they made a great advance upon the common law in the limitation of future estates.¹

NOTE. — "At common law a man could not limit a remainder to himself, nor could he limit it to his heirs, for *filius est pars patris*; see *Champernon's Case*, 4 H. 6, 19 b. pl. 6; *Earl of Bedford's Case*, Mo. 718. Therefore, if a lease were made to A. for life, remainder to the right heirs male of the body of the lessor, remainder to the right heirs of the lessor for ever, the limitations to the heirs would be void, because the donor could not make his right heir a purchaser *without departing with the whole fee-simple out of his person*. *Greswold's Case*, Dy. 156 a, pl. 24. So if a man makes a lease for life, the remainder to himself in tail or in fee, the remainder is void. But as Lord C. J. Hale observed, in all cases touching uses there is great difference between a feoffment to uses, a covenant to stand seised, and a conveyance at the common law. If a man by feoffment to uses conveys lands to the use of J. S. for life, he may remit the use to himself and the heirs male of his body by the same deed, and so alter that which was before a fee-simple, and turn it into another estate; but if A. gives land to B. for life, remainder to A. and the heirs male of his body, because a man cannot give to himself, the remainder is void, for a man cannot convey to himself by a conveyance at the common law. 1 Ventr. 377, 378. And in *Southcot and Stowel*, 2 Mod. 207, the court held, that though at the common law a man cannot be donor and donee

¹ See also Leake, 350-352.

HEELIS *v.* BLAIN.

COMMON PLEAS. 1864.

[Reported 18 C. B. N. S. 90.]

APPEAL¹ from the decision of a revising barrister disallowing the claim of the appellant, Arthur Heelis, to have his name retained on the list of voters for the township of Pendleton. In 1839, by indentures of lease and release, land was conveyed to Spencer in fee to the use, intent, and purpose that John Robinson, his heirs and assigns, should and might have, receive, and take from said land a yearly rent of £50, by half-yearly payments, on June 24 and December 25, and to further uses. Robinson, in 1862, granted the rent-charge to Stephen Heelis and his heirs; and on January 27, 1864, Stephen Heelis granted it to John Heelis and his heirs, to the use of the said John Heelis and five other persons and their respective heirs, as tenants in common. Of these persons the appellant was one.

The half-year's rent which became due June 24, 1864, being the first which became due after the execution of the indenture of January 27, 1864, was, on July 8, paid to the said John Heelis, for himself and the said five other persons, and he paid their shares over to the others at various times between July 8 and July 30. No part of the rent-charge was paid after January 27, 1864, until the rent-charge due June 24 was paid.

without he part with the whole estate, yet it is otherwise upon a conveyance to uses; and see Co. Lit. 22 b.

"The student must cautiously observe, that in these cases the rules of law still remain in full force, as applicable to common law conveyances, by which the estates are created at once, and not served out of the seisin of the feoffee. The Statute has given one conveyance the same operation which two formerly had, and therefore considering a conveyance to uses as having a double operation, the strict rules of law remain, even in regard to them. This, however, at first sight does not appear to be the case on a covenant to stand seised, for a man may covenant to stand seised to the use of himself in tail, and the use will be served out of his own seisin, and transferred into a possession by the Statute. But there is no solid distinction between this case and the others; for immediately after the execution of the covenant, equity supplies a common law conveyance by holding the covenantor himself to be a trustee, and to stand seised to the use: on this seisin the Statute attaches, and thus the use takes effect as a legal estate, although the owner did not actually depart with any portion of the estate, much less the fee out of himself. It should be remembered, that the omission of a few words in a conveyance will call this important distinction into action. If a man makes a feoffment at once to A. for life, remainder to himself in tail, the deed would operate purely at common law, and the remainder would be void; but if the feoffment were made to A. and his heirs, to the use of A. for life, remainder to the feoffor in tail, the remainder would be good,—at law the entire fee-simple would vest in A., in equity A. would be seised to the uses, and the Statute operating on this seisin would clothe the uses with the legal estate." *Gilb. Uses* (Sugden's ed.), 150-152, note.

¹ This short statement is submitted for that in the report.

It was objected to the claim of the appellant that he had not been in the actual possession or in the receipt of the rent for his own use for six months next previous to the last day of July, as required by St. 2 Wm. IV. c. 45, § 26; and on this ground the revising barrister disallowed the claim.

Joshua Williams, for the appellant.

Keane, Q. C., for the respondent.

ERLE, C. J. I am of opinion that the revising barrister is wrong, and that the claimant is entitled to be registered. He claimed to have been in the actual possession of a share of a rent-charge for six calendar months before the 31st of July; and it appears that more than six months before that day a rent-charge of £50 which had been created by the owners in fee-simple of certain land in Pendleton in 1839, was conveyed by Stephen Heelis, to whom it had come by various mesne assignments, to John Heelis and his heirs, to the use of the claimant and five other persons as tenants in common. No payment on account of the rent-charge was due or paid to the claimant and the other five persons until after the 24th of June, 1864; and, if it had been the case of a conveyance at common law, without the aid of the Statute of Uses, it is clear from *Hayden*, app., *The Overseers of Twerton*, resp., 4 C. B. 1; 1 Lutw. Reg. Cas. 510, that there would have been no actual receipt of the rent-charge so as to entitle the claimant to be registered. But the conveyance under which the party claims here is a conveyance operating by the Statute of Uses; and the 1st section of that Statute enacts, that, where any person shall be seised of (amongst other things) any rent, &c., in trust for any other person, &c., the *cestui que trust* shall have lawful seisin and possession of the same. The Statute 2 W. 4, c. 45, § 26, enacts that no person shall be registered in any year in respect of his estate or interest in any lands or tenements, &c., unless he shall have been in the actual possession thereof, or in the receipt of the rents and profits thereof, for his own use, for six calendar months, &c. The 27 H. 8, c. 10, § 1, says, that, where any person is seised of a rent to the use of any other person, the person who has the use shall stand seised in possession of such rent to all intents and purposes in the law. I am of opinion that the word "possession" has a technical meaning, and that the Legislature in the time of Henry 8 and the Legislature in the time of William 4 attached the same meaning to the words "actual possession," and that a conveyance under the 27 H. 8, c. 10, gives the *cestui que use* the actual possession which is required to constitute a qualification under the 2 W. 4, c. 45, § 26. It is said that the merely interposing an use is an evasion of the Statute. But I attach no weight to that argument, because the two cases which have held that actual receipt of the rent is essential to perfect the right to be registered, show that the handing over anything in the name of the rent would afford less facility of proof than the production of a deed operating by virtue of the Statute of Uses, which has been put in practice thousands of times since the time

of Henry 8. So far, therefore, as regards the Statute. Then, as to the authorities, Mr. Williams has invited our attention to some which are entitled to the very highest respect. In *Anonymous*, Cro. Eliz. 46, is a resolution of divers justices that *cestui que use* at this day is immediately and actually seised and in possession of the land, so as he may have an assise or trespass before entry against a stranger who enters without title; and this by the words of the 27 H. 8, c. 10, viz., “that *cestui que use* shall stand and be seised,” &c. And, though the report is short, it is not the less valuable, for, often in the reports of that day the most important propositions are laid down in four or five lines, and certainly lose no force by reason of their conciseness. Then, again, we have Bacon’s Readings upon the Statute of Uses, which is also entitled to very great respect. So, Chief Baron Comyns, whose great work stands high in the estimation of every one in the profession, and who is the universal referee for almost every proposition, lays it down, — title *Uses* (I.), — that, “by the Statute 27 H. 8, c. 10, *cestui que use* is immediately seised and in actual possession, and therefore shall have assise or trespass against a stranger before entry;” adopting the *dictum* in Cro. Eliz. 46. Then we have the authority of Co. Lit. 315 a, and Butler’s note, which seems to me to involve the whole of the learning contained in the judgment of Tindal, C. J. in *Murray*, app., *Thorniley*, resp., 2 C. B. 217; 1 Lutw. Reg. Cas. 496. Butler’s note points out the distinction between the conveyance of a rent at common law and the limitation of a rent as an use under the Statute. Then, I take notice of that which is not strictly authority, viz., Cruise’s Digest, vol. 3, p. 274, § 15, and Burton’s Compendium of the Law of Real Property, § 1116; and I think I am warranted in so doing, since it is a main ground of Lord Eldon’s judgment in the *Britton Ferry Case* that the practice of conveyancers is to be taken notice of by those who administer the law, — a very wise and salutary principle; for, according to my experience, the persons intrusted with that branch of the law have ever been remarkable for ability and learning: and the argument which we have heard this day satisfies me that the mantle of those great men has not descended upon unworthy shoulders.

KEATING, J. I also am of opinion that the decision of the revising barrister in this case was wrong; but I feel bound to add, that, if I had been called upon to decide the point, unaided by the light of the able argument we have heard this day, I should have come to the same conclusion. Mr. Williams has satisfied me that there is a clear distinction between the grant of a rent-charge at common law and a grant operating by virtue of the Statute of Uses. The 26th section of the Reform Act enacts that no person shall be registered in any year in respect of his estate or interest in any lands or tenements, as a freeholder, &c., unless he shall have been in the *actual possession* thereof, or in the receipt of the rents and profits thereof, for his own use, for six calendar months at least next previous to the last day of July in such year. In *Murray*, app., *Thorniley*, resp., 2 C. B. 217; 1 Lutw.

Reg. Cas. 496, it was held that a grant of a rent-charge at common law did not give the grantee a right to be registered under that provision unless he had been in actual receipt of the rent for the prescribed period. The Chief Justice founds his judgment in that case upon the very authorities which have been brought before us to-day. He cites the 235th section of Littleton: "And so it is, if a man grant by his deed a yearly rent issuing out of his land to another, &c., if the grantor thereafter pay to the grantee a penny or a halfpenny in name of seisin of the rent, then, if after the next day of payment the rent be denied, the grantee may have an assise, or else not, &c." Lord Coke, exemplifying his own doctrine that there is often virtue in an etcetera, explains what that means, thus: "By this &c. is implied that the grant and delivery of the deed is no seisin of the rent; and that a seisin in law, which the grantee hath by the grant, is not sufficient to maintain an assise or any other real action, but there must be an actual seisin." Mr. Williams admits that the actual possession spoken of in the Reform Act must be such an actual possession as would have entitled the party to maintain an assise. Then we find from the *Anonymous Case* in Cro. Eliz. 46, — which certainly derives additional authority from being cited by Chief Baron Comyns, — that, "by the Statute 27 H. 8, c. 10, *cestui que use* is immediately seised and in actual possession, and therefore shall have assise or trespass against a stranger before entry." That therefore brings this case precisely within the ground upon which *Murray*, app., *Thorniley*, resp., was decided, and establishes the distinction between the grant of a rent-charge at common law, and a grant under the Statute of Uses. Upon these grounds I am of opinion that the revising barrister took an erroneous view of this case, and consequently that his decision must be reversed.

Williams asked for costs.

ERLE, C. J. Where the decision is in favour of the appellant, no costs are allowed. But, where the decision is in favour of the respondent, the *general* rule is to give him his costs, — the court reserving to itself the right to modify the rule as the circumstances of each case may seem to them to render it expedient.¹

Decision reversed.

¹ See *Sammes's Case*, 13 Co. 54; *Orme's Case*, L. R. 8 C. P. 281; *Hadfield's Case*, L. R. 8 C. P. 306. "The third word is the word *other*; for the Statute meant not to cross the common law. Now at this time uses were grown to such a familiarity, as men could not think of possession, but in course of use; and so every man was seised to his own use as well as to the use of others; therefore because statutes would not stir nor turmoil possessions settled at common law, it putteth in precisely this word, *other*, meaning the divided use, and not the conjoined use; and this causeth the clause of joint feoffees to follow in a branch by itself; for else that case had been doubtful upon this word, *other*." Bacon, *Uses*, 43.

WITHAM v. BROONER.

SUPREME COURT OF ILLINOIS. 1872.

[Reported 63 Ill. 344.]

APPEAL from the Circuit Court of Mason county; the Hon. CHARLES TURNER, Judge, presiding.

This was a suit in ejectment, brought by Witham against Brooner. It appears that Summers and wife made a deed to the land in question to Thomas Hollowbush, "in trust for White and Smith forever" — being a naked trust, imposing no duties, payment of debts nor taxes, control or otherwise upon the trustee. Smith and wife, afterwards, without the agency or concurrence of Hollowbush, trustee, sold by deed to Witham. The record shows possession, but no claim of title in Brooner. The case comes to this court upon exception to the ruling of the court below refusing to permit the reading in evidence of the deed from Smith and wife to Witham.

Messrs. *Dearborn & Campbell*, for the appellant.

Messrs. *Lacey & Wallace*, for the appellee.

MR. JUSTICE THORNTON delivered the opinion of the Court:

The refusal to admit in evidence the deed to Hollowbush is the only error assigned.

The deed was executed to Hollowbush "in trust for White and Smith." The trustee had no trusts to execute — no duties to perform. He was a mere naked trustee.

One of the *cestuis que trust* had executed a deed to the same land to the plaintiff below, under which he claimed title.

In whom was the legal estate, by operation of the deed to Hollowbush — the trustee or the *cestuis que trust*?

Our statute is a substantial re-enactment of the Twenty-seventh Statute of Henry VIII. — usually termed the Statute of Uses. Leaving out some of the verbiage, it enacts that when any person shall be seized of any lands, to the use, confidence or trust of any other person, by any bargain, sale, agreement or otherwise, in such case all persons that have such use or trust in fee simple shall be seized, deemed and adjudged in lawful seizin, estate and possession of and in the same land, to all intents, in law, as they shall have in the use or trust of and in the same. Rev. Stat. 1845, p. 103, sec. 3.

The clear and positive language of the statute, aided by the first section of the same act, unmistakably determines the question. The person having the use shall be adjudged to be in lawful seizin, estate and possession. No language could more aptly stamp the character of the title.

Livery of seizin is abolished by the first section of the Conveyance

Act, and the title is thereby absolutely vested in the donee, grantee, bargainee, etc., independently of the Statute of Uses. Hence, under this statute, a deed in the form of a bargain and sale must be regarded as having the force and effect of a feofment; and under the Statute of Uses, a feofment to A., for the use of or in trust for B., would pass the legal title to B. In a deed purely of bargain and sale, independently of the first section of the Conveyance Act, the rule would be different, and the title would vest in the bargainee. Without the first section, the legal title would be in the trustee, in this case; but as the trust was a passive one, the deed operated as a feofment would at common law, and vested the legal title in the *cestuis que trust*, by virtue of the Statute of Uses. Thus the statute executes itself. It conveys the possession to the use, and transfers the use to the possession; and by force of the statute the *cestuis que trust* had the lawful seizin, estate and possession.

The three things necessary to bring this estate within the operation of the statute did concur. There was a person seized to a use; a *cestui que use*; and a use *in esse*. The use was then executed, and the statute operated. There was nothing in the deed to prevent the execution of the use. There was nothing to be done by the trustee to make it necessary that he should have the legal estate. There was to be no payment of rents and profits to another, or debts, or taxes. The statute operated instantly, and vested the legal estate in the *cestuis que trust*.

All the authorities sustain this view.

Blackstone says that previous to the enactment of Twenty-seventh Henry VIII, abundance of statutes had been provided which tended to consider the *cestui que use* as the real owner, and that this idea was carried into full effect by the Twenty-seventh Henry VIII, called, in conveyances and pleadings, the Statute for Transferring Uses into Possession; that the statute annihilated the intervening estate of the feoffee, and changed the interest of the *cestui que use* into a legal instead of an equitable ownership; and that the legal estate never vests in the feoffee for a moment, but is instantaneously transferred to the *cestui que use*, as soon as the use is declared. Book 2, 332-333, Black. Com.

CRUISE, in his Digest of the Law of Real Property (Green. Ed. 1 Vol. top p. 313, sec. 34), says when the three circumstances concur, necessary to the execution of a use, "the possession and legal estate of the lands out of which the use was created are immediately taken from the feoffee to uses, and transferred, by the mere force of the statute, to the *cestui que use*. And the seizin and possession thus transferred is not a seizin and possession in law only, but are actual seizin and possession in fact — not a mere title to enter upon the land, but an actual estate.

See also Smith Real and Per. Prop. 155; 1 Land Uses, 119; 2 Wash. Real Prop. 120, 1 Ed.; 4 Kent Com. 288 *et seq.*; *Webster v. Cooper*, 14 How. (U. S.) 488; *Barker v. Keat*, 2 Mod. 250.

We are of opinion that the legal estate was in the *cestuis que trust*, and that the rejected deed was admissible.

The cases referred to in this court are not in conflict with our conclusion.

The judgment is reversed and the cause remanded.

*Judgment reversed.*¹

SECTION VI.

USES NOT EXECUTED BY THE STATUTE.

NOTE. 1544.

[*Reported Bro. Ab. Feoff. al Uses, 52.*]

A MAN makes a feoffment in fee to his own use for the term of his life, and that after his decease J. N. shall take the profits; this makes a use in J. N. Otherwise if he says that after his death, the feoffees shall take the profits and deliver them to J. N., this does not make a use in J. N., for he never has them unless by the hands of the feoffees.

TYRREL'S CASE.

COURT OF WARDS. 1557.

[*Reported Dyer, 155.*]

JANE TYRREL, widow, for the sum of four hundred pounds paid by G. Tyrrel her son and heir apparent, by indenture enrolled in chancery in the 4th year of E. 6, bargained, sold, gave, granted, covenanted, and concluded to the said G. Tyrrel all her manors, lands, tenements, &c. to have and to hold the said &c. to the said G. T. and his heirs for ever, to the use of the said Jane during her life, without impeachment of waste; and immediately after her decease to the use of the

¹ See *Doe Snyder v. Masters*, 8 U. C. Q. B. 55.

NOTE. — *Scintilla Juris*. "The mode of operation of the Statute with future uses, when limited by way of contingent remainders or as springing or shifting uses, formerly caused much perplexity and difference of opinion. The Statute seemed to exhaust the seisin in serving the prior vested uses, so as to leave none to serve such future uses as and when they should arise. To meet this difficulty it was conceived that there remained in the grantees to uses a possibility of seisin, becoming an actual seisin when the executory uses required it. This was the celebrated doctrine of the *scintilla juris*, as this possibility of seisin was called. The only practical bearing of this doctrine lay in the suggestion that the *scintilla juris* might be dealt with in a manner to risk the safety of the dependent uses.

"After much abstruse speculation concerning the nature of the statutory process, the result generally accepted seems to have been that it immediately converted uses of all admissible kinds into legal limitations in a manner quite beyond the power or control of the grantees to uses, and that the latter were merely formal instruments for carrying the legal title to the uses." Leake, *Dig. Land Law*, 116.

See *Sugd. Pow.* (7th ed.) c. 1, § 3.

said G. T. and the heirs of his body lawfully begotten, and in default of such issue, to the use of the heirs of the said Jane forever. *Quære* well whether the limitation of those uses upon the *habendum* are not void and impertinent, because an use cannot be springing, drawn, or reserved out of an use, as appears *prima facie*? And here it ought to be first an use transferred to the vendee before that any freehold or inheritance in the land can be vested in him by the enrolment, &c. And this case has been doubted in the Common Pleas before now; *ideo quære legem*. But all the judges of C. B. and SAUNDERS, Chief Justice, thought that the limitation of uses above is void, &c. for suppose the Statute of Enrolments [cap. 16] had never been made, but only the Statute of Uses [cap. 10], in 27 H. 8, then the case above could not be, because an use cannot be engendered of an use, &c. See M. 10 & 11 Eliz. † fol.

SYMSON AND TURNER.

CHANCERY. 1700.

[Reported 1 Eq. Cas. Ab. 383, note.]

BUT notwithstanding this statute, there are three ways of creating an use or a trust,¹ which still remains as at common law, and is a creature of the court of equity, and subject only to their controul and direction: 1st, Where a man seised in fee raises a term for years, and limits it in trust for A. &c. for this the statute cannot execute, the termor not being seised.² 2dly, Where lands are limited to the use of A. in trust to permit B. to receive the rents and profits; for the statute can only execute the first use. 3dly, Where lands are limited to trustees to receive and pay over the rents and profits to such and such persons; for here the lands must remain in them to answer these purposes; and these points were agreed to.

COOPER v. FRANKLIN.

KING'S BENCH. 1616.

[Reported Cro. Jac. 400.]

EJECTMENT. Upon a special verdict, for lands in Phelpham, the case was, John Walter was seised of those lands in fee, and made a feoff-

¹ The modern trust, as distinguished from the use executed by the Statute, forms the subject of a separate course and of text-books.

² Bacon, Uses, 42. The second word material is the word *seised*: this excludes chattels. The reason is, that the Statute meant to remit the common law, Chattels might ever pass by testament or by parol; therefore the use did not pervert them.

ment of them to Thomas Walter, *habendum* to him and his heirs of his body, to the use of him and his heirs and assigns for ever. The question was, Whether Thomas Walter had an estate in fee tail only, or in fee determinable upon the estate tail?

First, Whether a use may be limited upon an estate tail at the common law, or at this day after the Statute of 27 Hen. 8, c. 10, of Uses.

Secondly, Whether this limitation of uses to him and his heirs shall not be intended the same uses, being to the feoffee himself, and to the same heirs, as it is in the *habendum*? *Quære, quia non adjudicatur.*

But the opinion of the court upon the argument inclined, that he was tenant in tail; and the limitation of the use out of the tail is void as well after the statute as before; for the Statute never intended to execute any use, but that which may be lawfully compelled to be executed before the statute; but this cannot be of an estate tail; for the Chancery could not compel him at the common law to execute the estate; and so the Statute doth not execute it at this day. *Vide* 27 Hen. 8, pl. 2; 24 Hen. 8, pl. 62; "Feoffments al Uses," 41. *Et adjournatur.*¹

DOE d. LLOYD v. PASSINGHAM.

KING'S BENCH. 1827.

[Reported 6 B. & C. 305.]

EJECTMENT for lands in the county of Merioneth. Plea, the general issue. At the trial before *Burrough*, J. at the last summer assizes for Salop, it appeared that the lessor of the plaintiff claimed as devisee in tail under the will of Catherine Lloyd, who was co-heiress, with her sister Mary, of Giwn Lloyd, who died in 1774. In 1746, by indenture made between himself, G. Lloyd, of the first part, Sarah Hill of the second part, Sir Rowland Hill and John Wynne of the third part, and Sir Watkin Williams Wynne and Edward Lloyd of the fourth part; in consideration of an intended marriage with the said Sarah Hill, and of a sum of £8,000, being the marriage portion of the said Sarah Hill, paid or secured to be paid to him Giwn Lloyd, he, Giwn Lloyd, did grant, release, and confirm unto the said Sir Watkin Williams Wynne and Edward Lloyd in their actual possession then being, by virtue of an indenture of bargain and sale, &c., and to their heirs and assigns, certain premises therein particularly described, and, amongst others, the premises in question; to have and to hold the said premises with their appurtenances, unto the said Sir Watkin Williams Wynne and Edward Lloyd, their heirs and assigns; to the only proper use and behoof of them the said Sir Watkin Williams Wynne and Edward

¹ s. c. 3 Bulst. 184. See 1 Sand. Uses (5th ed.), 87, 88.

Lloyd, their heirs and assigns for ever, upon trust, nevertheless, and subject to the several uses, intents, and purposes thereafter mentioned, that is to say, to the use of the said Giwn Lloyd and his heirs until the said intended marriage should take effect, and from and after the solemnization of the said intended marriage, then to the use and behoof of Giwn Lloyd and Sarah his intended wife, and their assigns, for and during the term of their natural lives, and the longer liver of them, as and for her jointure and in lieu and full satisfaction of dower; and from and after the decease of such survivor to the use of Sir Rowland Hill and John Wynne, their executors, administrators, and assigns, for the term of one thousand years, to and for the several intents and purposes thereafter mentioned; and from and after the expiration or other sooner determination of that estate, to the use and behoof of the first son of the body of the said Giwn Lloyd on the body of the said Sarah Hill, his intended wife, lawfully to be begotten, and the heirs male of the body of such first son lawfully issuing; and for default of such issue, to the use and behoof of the second son in like manner, and then to the daughters; and for default of such issue, to the use and behoof of the said Giwn Lloyd, his heirs and assigns for ever. And it was thereby declared and agreed by and between all and every the said parties to the said indenture, that the term of one thousand years thereinbefore limited to Sir Rowland Hill and John Wynne, was upon trust that they did and should immediately after the decease of Giwn Lloyd, by sale or mortgage of the whole or any part thereof, raise the sum of £3,000 to be paid and applied in manner thereafter mentioned. And it was thereby declared and agreed by and between the parties to the said indenture that a sum of £4,000 of the said sum of £8,000 should immediately after the solemnization of the said intended marriage be paid into the hands of them the said Sir Rowland Hill and John Wynne, upon trust that the same should be paid, laid out, and applied by them with all convenient speed in the purchase of freehold lands, tenements, or hereditaments in fee simple, in the county of Merioneth aforesaid or elsewhere in the principality of Wales, or in that part of Great Britain called England, with the approbation of them the said Giwn Lloyd and Sarah Hill, his intended wife, or the survivor of them, testified by any deed or writing under the hands and seals of them the said Giwn Lloyd and Sarah Hill, and the survivor of them, duly executed in the presence of two or more credible witnesses; and that the said lands, tenements, and hereditaments, when so purchased, and every part and parcel thereof, with their appurtenances, should be conveyed to them the said Sir Watkin Williams Wynne and Edward Lloyd, and their heirs, and to the survivor of them and his heirs, *to and for the use and behoof of the several persons, and for such estate and estates* as the premises thereinbefore mentioned, and thereby granted and released by the said Giwn Lloyd, were conveyed, settled, limited, and appointed. And it was thereby also further declared and agreed that in case there should be no issue of the said

intended marriage, and that the said Sarah Hill should be minded by her last will and testament to give or devise any sum not exceeding £4,000, or the estate thereby intended to be purchased therewith, or any part thereof as aforesaid, to any person or persons whatsoever, it should be lawful to and for her the said Sarah Hill, notwithstanding her coverture, to give and devise the same, or any part thereof, to such person or persons, and to and for such estate and estates, and such uses, intents, and purposes, as she should limit, direct, and appoint; and in such case they the said Sir Watkin Williams Wynne and Edward Lloyd should stand seised of all and every the lands, tenements, and hereditaments so to be purchased as aforesaid, to them and their heirs, to and for such uses, intents, and purposes, as she the said Sarah Hill should, by such her last will, limit, direct, and appoint; and then and from thenceforth all and every the uses and limitations to the said Giwn Lloyd and his heirs, of and concerning the said lands, tenements, and hereditaments to be purchased as aforesaid, should cease, determine, and be absolutely void, to all intents and purposes whatsoever.

Giwn Lloyd died in 1774, and Sarah his wife in 1782, intestate, and without having had any issue. Catherine Lloyd, the testatrix, continued in possession of the estate from the death of Sarah Lloyd until the time of her own death, in 1787. For the defendants, it was contended, that the legal estate was vested in Sir W. W. Wynne and Edward Lloyd, by the deed of 1746, and, consequently, that neither Giwn Lloyd nor the testatrix had any legal estate; and, therefore, the lessor of the plaintiff could not derive any such estate from her. The learned judge reserved the point, and the plaintiff having obtained a verdict, a rule *nisi* for entering a nonsuit was granted in Michaelmas term.

Tarnton, Campbell, and Richards now showed cause.

Shadwell, Oldnall Russell, and E. V. Williams, contra.

BAYLEY, J. I am of opinion that we ought not to make the rule absolute for entering a nonsuit, but that there should be a new trial in this case. Considering the length of time that has elapsed since the purposes of the settlement made by Giwn Lloyd were at an end, I think the question as to presuming a reconveyance of the legal estate ought to be submitted to a jury. The first point for our consideration is upon the construction of the settlement; for if it vested the legal estate in the trustees, then the lessor of the plaintiff had not the legal estate unless there had been a reconveyance. The limitation is to Sir W. W. Wynne and E. Lloyd, and to their heirs and assigns, *habendum* to them their heirs and assigns, to the only proper use and behoof of them their heirs and assigns upon certain trusts. I felt upon first reading it, that this was in a very singular form, and it appeared to me that the words "to the use and behoof of them their heirs and assigns," had been introduced by an accidental mistake, but I now think that they were introduced by design, but through ignorance. It is certainly singular that Giwn Lloyd should part with the legal estate immediately on the execution of the settlement, and that he and his wife should only

be equitable tenants for life. It is also singular that the term created for the purpose of raising portions should be a mere equitable term, and that the lands to be purchased with the £4,000 should be limited in such a manner as to leave it doubtful whether or no the *cestui que trust* would take the legal estate. That would not necessarily be the case, for the direction, that the estate purchased should be limited "for such estate and estates" as the other premises, might mean for equitable estates; and, therefore, this is not absolutely inconsistent with the idea that the trustees were to take the legal estate. And on the other hand, the power which Giwn Lloyd and his wife would have had to defeat all the contingent limitations, if the trustees did not take the legal estate, shows so strong a purpose to be answered by construing the deed according to the strict legal operation of the language used that I think we are not at liberty to put any other construction upon the words than that which they usually bear. Now, ever since I have belonged to the profession of the law, I have invariably understood that an use cannot be limited upon an use. That is admitted to be so in general, but a distinction has been taken where the limitation is to A., to the use of A. in trust for B., and it is said that then A. is in by the common law. That is true; but he is in of the estate clothed with the use, which is not extinguished, but remains in him. In the case of *Meredith v. Joans*, cited in argument to show that where an estate is limited to A., to the use of A., he is in by the common law, it is said, "for it is not an use divided from the estate, as where it is limited to a stranger, but *the use and the estate go together.*" That case therefore shows, that although the trustees in this case might be in by the common law, yet they were in both of the estate and the use. There are two cases expressly in point. *Lady Whetstone v. Bury* [2 P. Wms. 146] is a very clear case, and the words used were precisely the same as those found in the deed in question, and it was there decided, and also in *The Attorney General v. Scott* [Cas. temp. Talb. 138], which came before Lord Talbot, one of the greatest real property lawyers that ever filled the office of Lord Chancellor, that the legal estate vests in him to whom by the words of the instrument the use is limited. Upon the authority of these two cases, I am of opinion that the use of the estate in question was executed in the trustees. Then, upon the other question, there is certainly some ground for presuming a reconveyance; but, on the one hand, I think the court would be going a great deal too far were they to make such a presumption, and, on the other, I think the lessor of the plaintiff ought to have an opportunity of submitting that point to a jury. The rule should, therefore, be made absolute for a new trial.

HOLROYD, J. I agree with my Brother Bayley, that in this case there ought to be a new trial. Upon the first perusal of the deed in question I had no doubt that the legal estate was vested in the trustees, having always understood that an use cannot be limited upon an use; and although I was struck by the ingenuity of the distinction

pointed out by Mr. Taunton, yet upon further consideration it appears to me that his argument does not warrant it. The argument is, that as the trustees did not in the first instance take to the use of another, but of themselves, they were in by the common law, and not the Statute; that the first use was, therefore, of no effect, and the case was to be considered as if the deed had merely contained the second limitation to uses. But that is not so; for although it be true that the trustees take the seisin by the common law, and not by the Statute yet they take that seisin to the use of themselves, and not to the use of another, in which case alone the use is executed by the Statute. They are, therefore, seised in trust for another, and the legal estate remains in them. As to the question of intention, even if it were intended that the deed should operate in a different mode from that pointed out by the law, when the legal estate is given to trustees that intention cannot countervail the law. But the intention appears to me altogether doubtful; the absence of trustees to preserve contingent remainders affording a strong reason for supposing that the parties meant to give the legal estate to the trustees.

LITLEDALE, J. I am entirely of the same opinion. It is said that by the construction now put upon the deed the intent of the parties will be defeated. If we were not construing a deed, I should feel disposed to give a liberal effect to the intention, but if all matters of convenience and inconvenience which raise a presumption of intention are to be taken into consideration, as affording rules for the construction of deeds, and are to have the effect of overruling the plain words of such instruments, the law will very soon be thrown into utter confusion. Here, however, there is a balance of inconveniences, and therefore we may come at once to the legal construction of the settlement. I never entertained a doubt that a second series of uses could not be executed. It is true that certain cases show these trustees to have taken the estate by the common law, but they took it coupled with the use. The cases cited upon this point are perfectly clear, and they are well collected in a note, by Serjeant Williams, to *Jefferson v. Morton*, 2 Saund. 11, n. 17. However, for the reasons given, I think that there ought not to be a nonsuit, but a new trial.

Rule absolute for a new trial.

CHAPTER VI.

WILLS OF LAND.

DIGBY HIST. REAL PROP. (4th ed.) 375-377. It has been seen that one of the most remarked effects of the growth of feudalism was the abolition, except in certain localities, of the practice of devising interests in land by will.¹ Such a disposition would have defeated the most valuable rights of the lord — relief, wardship, and marriage. It was therefore wholly inconsistent with feudal theories. In a great many boroughs, and in gavelkind lands, local customs were sufficiently strong to preserve the ancient liberty of disposition by will, and cases relating to ‘burgages devisable’ are common in the Year-Books.

It has also been seen how the practice of disposing of uses of land by will became prevalent under the protection and encouragement of the Chancellors. One of the earliest of the recorded cases on this branch of the law contains a disposition by will, or rather perhaps settlement, of the use of lands made in the 6th year of Richard II.² Except therefore in the case of burgages devisable, a devise, before the legislation presently to be noticed, was simply a declaration of the legal tenant of the uses to which his heir at his death should hold the lands, or of the uses to which he had conveyed the lands to feoffees (such conveyance having been expressed to be to the use of his will), or else a disposition of a use which had already been created in favor of himself.

In order therefore that the devisee of the use might enforce the disposition of the will the aid of the Chancellor was called in. The Chancellor would compel, if necessary, the tenant of the legal estate to convey the land devised to *cestui que use*, the devisee.

It appears from the title and preamble of the Statute of Uses that one of its principal objects was to abolish the power of disposing of interest in lands by will, and thereby to restore to the king and the great lords, the feudal dues which they could not claim if the estate of the heir were defeated by a devise.

The Statute of Uses contained a saving in favour of wills made before the first day of May, 1536,³ the year following that of the passing of the Statute. Between that time and July 20, 1540, the power of testation was, as regards freehold interests in lands, wholly abolished,⁴ except in the localities mentioned above. It may however, be well believed that it was impossible for the legislature, arbitrary and

¹ See 2 P. & M. Hist. (2d ed.) 326. — Ed.

² *Rothanhale v. Wychingham*, Cal. ii. page iii.

³ Sec. 9.

⁴ See Bacon, Uses, Rowe's Note, 80. — Ed.

thorough-going as it was, to maintain a restriction so opposed to the habits and practices which had prevailed throughout the Country ever since uses had been understood and protected by the Chancellor. Accordingly in the 32d year of Henry VIII. (1540), it was found necessary to restore a large measure of the power of devising interests in lands. The provisions of the Statute 32 Henry VIII. c. 1, are somewhat complicated; but the upshot of them is that power is given to every tenant in fee simple¹ to dispose of all his lands held by socage tenure, and of two-thirds of his lands held by Knight-service. Careful provision is made by the Statute for the saving of primer seisin, reliefs, and fines on alienation, in the case of socage lands, and of the rights of wardship over the third part of Knight-service lands, in favor of the King or other lord.

When by the Act for the abolition of military tenures, tenure by Knight-service was converted into free and common socage, the power of devise granted by the Statutes of Henry VIII. extended to the whole of the lands of which previously only two parts had been devisable.

No particular solemnity was required by the Statutes of Henry VIII. for the execution of wills. The first Statute spoke of a will or testament in writing or other act lawfully executed in the testator's life. Consequently bare notes in the handwriting of another person were allowed to be good wills within the Statute.² The law was altered by the Statute of Frauds (29 Car. II. c. 3), by which it was made a necessary condition of the validity of a will of lands that it should be signed by the testator, or by some other person in his presence and be subscribed by three or four credible witnesses.

The law of wills of all property whether real or personal now rests on the provisions of the Wills Act, 7 Will. IV. and 1 Vict. c. 26.

1 POWELL DEVISES, 4. Terms for years, and all chattel interests, also were not affected by this consequence of the introduction of feuds; they being, on account of their original insignificance, deemed personalty,³ and, as such, capable of disposition by will.

ELLIS HARTOP'S CASE.

COURT OF WARDS. 1591.

[*Reported 1 Leon. 253.*]

ELLIS HARTOP was seised of divers Lands, whereof part was holden of the King in Knights service, and devised two parts thereof to W. Denham and his Heirs to the use of T. his brother, and his wife, and

¹ So interpreted by 34 and 35 Henry VIII. cap. 5, sect. 3.

² Blackstone, ii. p. 376.

³ See 2 P. & M. Hist. (2d. ed.) 115-117. — ED.

afterwards to the use of the said T. and his Heirs males. T. died in the life of the Devisor, and afterwards a Son is born; First it was agreed that a Devise might be to the use of another; Then when *Cestuy que use* dyeth in the life of the Devisor, the Devisee shall take it, and when a Son is born, it shall go to him: But if the use be void, then the Devisee shall have it to his own use, for every devise doth imply a consideration: *Coke* was of opinion, That the Son takes by descent, when *Cestuy que use*, to whom Land is devised, doth refuse the use, the Devisee cannot take it, for he shall not have it to his own use, for if the use be void, the devise is also void: And the use is void, for *Cestuy que use* died in the life of the Devisor, which see *Bret* and *Rygdens Case*. A man seised of three Acres, bargains and sells one of them, without shewing which, and that before the Statute of 27 H. 8. The Bargainee dyeth before Election, no Election descends to the Heir, for then he should be a Purchasor: And by *Wray*, and *Anderson*, The devise is void, and it is all one with *Brett* and *Rigden's Case*. And by *Anderson*, a man deviseth Lands to the use of one, which use by possibility is good, and by possibility not good; If afterwards *Cestuy que use* cannot take, the Devise shall be to the use of the Devisor and his Heirs.¹

¹ "In the opening of the work it was observed, that a power given by a will was a common law authority. But here we must consider whether a devise to uses through the medium of a devisee, as a devise to A. and his heirs, to the use of B. and his heirs, will not take effect under the Statute of Uses. Upon this point a difference of opinion has been expressed: Butl. n. to Co. Lit. 271 b, III. § 5; Powell on Devises, 272; and see 1 Sand. on Uses, 195; and Fonbl. n. (e) to 2 Treat. Eq. p. 24, 2d edit. The Statute of Uses would equally operate on the 1 Vict. c. 26, and, indeed, the subject is exhausted by the learning which has been displayed upon it. Of course an immediate devise to A. for life, remainder to B. in fee, would be good, although no seisin was raised to serve those estates; or, in other words, lands may be devised without the aid of the Statute of Uses, and it is not material that the limitations are termed *uses*; and powers may be created in like manner. They will be common-law authorities, and the appointee will be in, not by the Statute of Uses, but by the devise. *Dike v. Ricks*, Cro. Car. 335. On the other hand, it seems equally clear that where a seisin is raised by will to feed uses created by it, such uses will be executed into estates by the Statute of Uses.

"In support of the contrary opinion, it is insisted that the Statute of Uses cannot refer to the Statute of Wills, which was not then in contemplation. It is said to be difficult to conceive how uses created under the testamentary power given by the Statute of Wills can be within the Statute of Uses; and that it may be argued that a Statute can never be considered as relating to anything which did not exist at the time of its passing. But this is well answered by *Coke*, who in *Vernon's Case*, Rep. 1, addressing himself to the precise objection, said 'It is frequent in our books, that an Act made of late time should be taken within the equity of an Act made long time before,' of which he gives many instances. And see *Williams v. Drewe*, Willes, 392; *Lane v. Cotton*, 1 Com. 100; *In re Perrin*, 2 Dru. & War. 147. In the principal case, that part of the Statute of Uses which relates to jointures, was holden to be within the equity of the Statute of Wills. It appears to have been thought in *Andrews's Case*, in 18 Eliz. Mo. 107, that the Statute of Uses would operate on uses created by will; and in *Popham and Bamfield*, 34 Car. II. 1 Vern. 79, and *Burchet and Durdant*, 2 Will. & M. 2 Ventr. 311, the same point was admitted both at the bar and by the court. In the case of *Hore and Dix*, 12 Car. II. 1 Sid. 26, 4th resol., it was resolved, that an

MICH. 38 AND 39 ELIZ., between Leak and Randall in the Court of Wards, it was resolved by the two Chief Justices *et tot' cur'* that if a man devises land to his wife for term of her life generally, it cannot be averred to be for the jointure of the wife, and in satisfaction of her dower for two reasons: 1st, because a devise implies a consideration in itself, and therefore as a devise cannot be averred to be to the use of another than of the devisee, unless it is expressed in the will, no more can a devise be averred to be for a jointure, unless it is so expressed in the will. But as it is said in the said case of 6 E. 6, it shall be taken for a benevolence, and so is the said case of 6 E. 6 to be intended. 2d, the whole will concerning lands by the statutes of 32 and 34 H. 8 ought to be in writing, and no averment ought to be taken out of the will which cannot be collected by the words contained in the will. — *Vernon's Case*, 4 Co. 4 a.

use could not be raised without a deed. And as to the case of a devise of land to uses, by a will in writing, which is not a deed, it was said, that that went upon another reason *scil.* rather upon the Statute of 32 H. VIII. of Wills, than upon the Statute of 27 H. VIII. of Uses. This case has been treated as an authority, that the use is executed by the Statute of Wills, and not by the Statute of Uses; but on the contrary, it appears to admit that the Statutes may have a concurrent operation. It was in like manner admitted in *Broughton and Langley*, 2 Ann. 2 Ld. Raym. 873; 2 Salk. 679, that a devise of lands may be by express words to the use of another than the devisee, and that such devise will be executed by the Statute of Uses. In later times the same point has been repeatedly ruled, or treated as clear, *Hopkins v. Hopkins*, 1 Atk. 589; *Bagshaw v. Spencer*, 1 Ves. 143; *Wright v. Pearson*, Fearn. Cont. Rem. 128; *Perry v. Phelps*, 1 Ves. jun. 255; *Thompson v. Lawley*, 2 Bos. & Pull. 311; *Doe v. Finch*, 4 Barn. & Adol. 288; and there is not a single case in which the point has been doubted. It must be considered therefore as settled, upon principle as well as authority, that the Statute of Uses may operate on uses created by will; and that where a seisin is created to serve the uses, the Statute will in most cases transfer the possession to them. It is not denied that a devise unto and to the use of one, will vest the legal estate in him, although ulterior uses are declared in favor of others; but this, perhaps, it may be said, is not by the operation of the Statute of Uses, but depends on an irresistible inference of the testator's intention, in analogy to the resolutions on limitations to uses in deeds. *Robinson v. Comyns*, For. 164; *Brydges v. Brydges*, 3 Ves. 120; and *Doe v. Passingham*, 6 Barn. & Cress. 305; 9 Dowl. & R. 461." Sugd. Pow. (8th ed.) 146-148.

See *Baker v. White*, L. R. 20 Eq. 166, 171.

BOOK IV.

NATURE AND INCIDENTS OF OWNERSHIP IN REAL PROPERTY.

CHAPTER I.

GOLD AND SILVER MINES.

AT Common Law all gold and silver occurring in any mine in *England* or *Wales* belonged to the Crown; and if metalliferous ores contained gold or silver to such an extent as to be worth extracting, and if such ores could not be obtained without interfering with such gold or silver, the whole of such ores belonged to the Crown; and the Crown had the right to work not only gold and silver mines, but also all other mines containing gold and silver worth extracting. This was settled in the great *Case of Mines*, 1 Plowd. 310. Mines containing gold or silver to such an extent as to be worth working for their extraction were called Royal mines. The best definition which I know of Royal mines is given by Sir *John Pettus* in his work *Fodinae Regales* (published in 1670). He says, page 75: "Although the gold or silver contained in the base metal of a mine in the lands of a subject be of less value than the base metal; yet, if the gold or silver do countervail the charge of refining it, or be of more worth than the base metal spent in refining it, this is a mine Royal; and as well the base metal, as the gold and silver in it, belong to the prerogative of the Crown." The rights of the Crown in Royal mines seriously obstructed the working of many of the most important mines in the kingdom. To remedy the inconvenience produced by this state of the law, two statutes were passed in the latter part of the seventeenth century, viz., 1 Wm. & M. c. 30, s. 4, and 5 Wm. & M. c. 6. The first of these Acts required all gold and silver, when extracted by refiners, to be taken to the *Mint*; but it also enacted, by sect. 4, that no mine of copper, tin, iron, or lead should be a Royal mine, although it might contain gold or silver. This enactment did not affect the right of the Crown to gold or silver in any mine. The Act prevented the Crown from claiming any copper, tin, iron, or lead mine on the ground that it contained gold or silver; and I apprehend that the Act also abrogated the right of the Crown to any copper, tin, iron, or lead ore got from any such mine on the ground that such ore contained gold or silver. But the gold or

silver, if any, remained the property of the Crown; and it is easy to see that owners of copper, tin, iron, or lead mines containing gold or silver might still be very much embarrassed in working their mines, notwithstanding such mines were no longer Royal mines.

The second Act, 5 Wm. & M. c. 6, was passed to remedy this state of things.

The preamble shews the object of the Legislature. The Legislature assumes that there is some copper, tin, iron, or lead mine worth working by the owner, and then authorizes him to work it, though it contains gold or silver; but the statute protects the Crown by giving it an option to take the ore, with the gold or silver in it, at certain prices. If the Crown does not desire to buy the ore at these prices, then the mine-owner can deal with the whole ore as he pleases, though there may be gold or silver in it.¹

¹ LINDLEY, J., in *Attorney-General v. Morgan*, [1891] 1 Ch. 432, 455.

See *Shoemaker v. U. S.*, 147 U. S. 282, 307; *Gold Hill Quartz Mining Co. v. Ish*, 5 Oreg. 104; 3 Kent, Com. 378, note (b).

"It would be a waste of time to show that none of the reasons thus advanced in support of the right of the Crown to the mines can avail to sustain any claim of the State to them. . . . The right of the Crown, whatever may be the reasons assigned for its maintenance, had in truth its origin in an arbitrary exercise of power by the King, which was at the time justified on the ground that the mines were required as a source of revenue." FIELD, C. J., in *Moore v. Smaw*, 17 Cal. 199, 221, 222.

By U. S. R. S. § 2319, it is provided that all valuable mineral deposits in United States lands, surveyed and unsurveyed, shall be open to exploration and purchase by citizens of the United States and by those who have declared their intention to become citizens, according to local customs of miners.

CHAPTER II. .

WILD ANIMALS.

SUTTON v. MOODY.

KING'S BENCH. 1697.

[Reported 1 *Ld. Raym.* 250.]

TRESPASS *quare clausum suum fregit et centum cuniculos suos adtunc et ibidem inventos venatus fuit occidit cepit et asportavit.* Upon not guilty pleaded, verdict for the plaintiff and entire damages. *Gould*, Serjeant, moved, in arrest of judgment, that conies are *feræ natura*, and therefore there is no property in them in any; therefore since the plaintiff has laid property in them by the word [*suos*] it is ill, and no damages ought to have been given for them. But if the action had been for having hunted *in warennæ suæ*, and killed *cuniculos suos* there found, it had been good, for then he would have had a privileged property in them. The same law for fish taken in *separali piscaria*. *F. N. B.* 87; *Greenhill v. Child*, *Cro. Car.* 399; *March*, 48; *W. Jones*, 440. But generally there is no property in things which are *feræ natura*, and therefore trover does not lie for a hawk, without alleging that he was reclaimed; and in such an action it was adjudged against the plaintiff, though it was alleged in the declaration, that he was possessed of the hawk as of his proper goods, *Dier*, 306 b, pl. 66. *Sed non allocatur.* For *per* *HOLT*, Chief Justice, a warren is a privilege, to use his land to such a purpose; and a man may have warren in his own land, and he may alien the land, and retain the privilege of warren. But this gives no greater property in the conies to the warrener, for the property arises to the party from the possession; and therefore if a man keeps conies in his close (as he may), he has a possessory property in them so long as they abide there; but if they run into the land of his neighbor, he may kill them, for then he has the possessory property. If A. starts a hare in the ground of B. and hunts it, and kills it there, the property continues all the while in B. But if A. starts a hare in the ground of B. and hunts it into the ground of C. and kills it there, the property is in A., the hunter; but A. is liable to an action of trespass for hunting in the grounds as well of B. as of C.¹

¹ So held in *Churchward v. Studdy*, 14 East, 249 (1811).

"I think Lord Holt must have been of opinion that as long as the game continued upon the land there was a species of property, or rather, perhaps, a right to take it, existing in the owner of the land, which was sufficient to make it his the instant, by being killed or taken, it became the subject of property. But I cannot so easily dis-

Co. Lit. 8 a. If a man buy divers fishes, as carps, breames, tenches, &c. and put them in his pond, and dyeth, in this case the heire shall have them, and not the executors, but they shall goe with the inheritance;¹ because they were at libertie, and could not be gotten without industrie, as by nets, and other engines. Otherwise it is, if they were in a trunke or the like. Likewise deere in a parke, conies in a warren, and doves in a dove-house, young and old, shall goe to the heire.²

cover the principle upon which he proceeds when he said that 'If A. starts a hare in the ground of B. and hunts it into the ground of C. and kills it there, the property is in A., the hunter; but A. is liable to an action of trespass for hunting in the grounds as well of B. as of C.'

"I have some difficulty in understanding why the wrongdoer is to acquire a property in the game under the circumstances here supposed. If the animal had left the land of B. and passed into the land of C. of its own will, and had been, immediately it crossed the boundary, killed by C., it would unquestionably have been his property. Why then should not the act of a trespasser, to which C. was no party, have the same effect as to his right to the animal as if it had voluntarily quitted the neighboring land? And why not only should B. lose his right to the game, and C. acquire none, but the property, by this accident of the place where it happened to be killed, be transferred to the trespasser? It would appear to me to be more in accordance with principle to hold that if the trespasser deprived the owner of the land where the game was started of his right to claim the property by unlawfully killing it on the land of another to which he had driven it, he converted it into a subject of property for that other owner, and not for himself." *Per LORD CHELMSFORD*, in *Blades v. Higgs*, 11 H. L. C. 621, 639.

¹ *Parlet and Bartholomew v. Cray*, Cro. Eliz. 372, *accord*.

² But deer in a park, when reclaimed, cease to belong to the inheritance. *Ford v. Tynte*, 2 J. & H. 150. See *Davies v. Powell*, Willes, 46. — *Ed.*

As to the right to hunt over submerged lands, see *Sterling v. Jackson*, 69 Mich. 488; *Hall v. Alford*, 114 Mich. 165.

In *Rexroth v. Coon*, 15 R. I. 35, plaintiff, without B's permission, placed a hive on the latter's land. Afterwards defendant, also without permission from B., carried away a swarm of bees and a quantity of honey from the box. It was held that plaintiff could not maintain trover against defendant. — *Ed.*

CHAPTER III.

TITLE-DEEDS.

LEATHES v. LEATHES.

CHANCERY. 1877.

[Reported 5 Ch. D. 221.]

THIS was a motion on behalf of the plaintiff, who was tenant for life in remainder of a settled estate under a will, that he might be at liberty to deposit in court the title deeds of the estate, and that they might be retained in the custody of the court till the hearing of the action, when they might be secured for the benefit of the several persons interested in the estate.

The deeds had come into the plaintiff's possession during the lifetime of his father, the testator, for whom he acted as solicitor.

The defendant, the first tenant for life, claimed to be entitled to the custody of the deeds, but the plaintiff alleged that he had long resided in Australia, also that, as there was a contest respecting the ownership of part of the estate, the defendant might make use of the deeds by showing them to those who had an adverse claim, to the prejudice of those entitled in remainder.

Ince, Q. C., and *Chester*, in support of the motion.

Chitty, Q. C., and *Langworthy*, for the defendant.

JESSEL, M. R. A legal tenant for life of freeholds is entitled to the custody of the title deeds as a matter of right, except in cases where he has been guilty of misconduct so that the safety of the deeds has been endangered, or where the rights of others intervene, and it becomes necessary for the court to take charge of the title deeds in order to carry out the administration of the property.

In *Garner v. Hannynghton*, 22 Beav. 627, 630, Lord Romilly held that "the legal tenant for life is *prima facie* entitled to the custody of the title deeds." The question came before the Court of Exchequer in *Allwood v. Heywood*, 1 H. & C. 745, when the full court held that it was but reasonable that the plaintiff, who was legal tenant for life, should have the custody of the title deeds. There are many *dicta* to the same effect, including a passage in Sugden's Vendors and Purchasers, p. 446, n.

The only case the other way is that of *Warren v. Rudall*, 1 J. & H. 1, 13, where the deeds were in court, and Vice-Chancellor Wood stated the rule thus: "With respect to the title deeds, it is a settled doctrine

that this court never interferes as to the possession of deeds between a father tenant for life and a son entitled in remainder; but in the case of a stranger tenant for life the court will interfere; and this is in fact a particularly strong case, because the deeds are in court, and I am asked to deliver them out. The reversioner has no connection with the tenant for life; the title deeds must remain in court." There is a *dictum* of Lord Hardwicke in *Pyncent v. Pyncent*, 3 Atk. 571, to the same effect; but it is quite contrary to law, for the mere fact of the reversioner being a stranger to the tenant for life has nothing to do with the question.

Now I come to consider what are the circumstances in which the court will interfere. First, the court will interfere when there is any danger to the safety of the deeds if left in the custody of the tenant for life; and, secondly, where the court is carrying out the trusts of the property, and the deeds are wanted for that purpose. Beyond these cases the court cannot go.

The case of *Stanford v. Roberts*, Law Rep. 6 Ch. 310, was referred to. In that case there was a pending suit affecting the estate; and, as I understand the case, the Lords Justices were of opinion that there was an actual duty to be performed by the trustees, and Lord Justice James observed: "This case does not appear to me to turn on the mere question of legal title. There is a pending suit which relates to these estates, and which is being actively prosecuted. The only question, then, is where, having regard to the purposes of the suit, the deeds can be most conveniently kept. The Vice-Chancellor has, in the exercise of his judicial discretion, held that it is most convenient to allow them to remain where they are, and with that discretion we shall not interfere."

The other case referred to was that of *Jenner v. Morris*, Law Rep. 1 Ch. 603, 606. That was rather a peculiar case. A suit had been instituted for raising portions out of a settled estate. Pending the suit, the tenant for life took a number of the leases to Paris. He afterwards, under an order of the court, brought the whole of the title deeds and leases into court for the purposes of the suit. After the purposes of the suit had been satisfied and the portions raised by mortgage, he applied to have the title deeds and leases given up to him. This application was opposed by the mortgagees, and refused by Vice-Chancellor Kindersley. When the case came before the Court of Appeal, Lord Justice Knight Bruce said: "I cannot, without the consent of the mortgagees, concur in an order for delivery of these documents to a tenant for life who on a former occasion has, without any necessity, taken a number of them out of the jurisdiction." Therefore the sole ground of his decision was, that the tenant for life had taken them out of the jurisdiction, and that in his opinion there was danger to the deeds if they remained in his custody. Lord Justice Turner did not agree, but by consent an order was made for the delivery of the deeds to the tenant for life upon his giving security for their safe custody, and

for their production at reasonable times, and for their return into court if ordered.

In the present case, the first reason in support of the motion that I have to consider is, that the tenant for life has for many years resided in Australia. That is no reason at all. Secondly, it is urged that there is a contest as to the ownership of a portion of the estate, and that the tenant for life might show the deeds to the adverse claimants. There appears, however, no ground for such a suspicion.

The motion must be refused.

NOTE. — HEIRLOOMS. "And note, that in some places chattels as heirlooms (as the best bed, table, pot, pan, cart, and other dead chattels movable) may go to the heir, and the heir in that case may have an action for them at the common law, and shall not sue for them in the ecclesiastical court; but the heirloom is due by custom, and not by the common law." Co. Lit. 18 b.

CHAPTER IV.

FIXTURES.

SECTION I.

WHEN CHATTELS BECOME FIXTURES.

A. *Annexation to One's Own Land.*

ANONYMOUS.

COMMON PLEAS. 1506.

[*Reported Year Book*, 21 *Hen. VII.* 26, pl. 4.]

IN trespass the case was this. A man was seised of a house in fee simple, and made a furnace, viz. of lead, in the middle of the house, and it was not fixed to the walls of the house. He made executors and died, the heir entered, and the executors took the furnace, viz. of lead, and the heir brought an action of trespass.

Pollard. It seems that the action lies ; for such things as are fixed and annexed to the freehold will descend to the heir with the inheritance, and so they will pass by feoffment with the freehold ; as where vats are fixed in the ground, or in a brewhouse or dyehouse, they are appurtenant to the freehold, and altered from the nature of a chattel. And where a paling is made to enclose an enclosure or pond, the executors will not take it, but the heir will have it. So of things fixed to the inheritance they belong and pass with the inheritance and the freehold. And so in some cases such things as are not annexed to the land and the freehold descend and pass with the inheritance as the windows : they are not fixed, and yet neither the executors nor the termor will take them, but the heir will have them, because a house is not perfect without the doors and windows. But it is otherwise with glass, for a house is perfect enough, although it has no glass ; and so there is a diversity. But in the case here, this furnace is altered by this fixing from the nature of a chattel. For it is adjudged in our books that an attachment in assise for a furnace is not good ; and the reason is that it is not a removable chattel ; and so the action here for the heir seems maintainable.

Grevill. Although this furnace is so fixed to the land, yet it is not therefore proved that it will go with the inheritance, so that it cannot

be severed from the inheritance, for by such a reason if anything was fixed to the land by the tenant for term of years, it will be immediately called parcel of the inheritance, and the termor will not take it; and this is not so, for although he fixes a post in the ground during the term, and he retakes it within the same term, yet the lessor will not retake it. And in our case here it appears that this furnace was fixed to the ground within the house, so that the inheritance is none the worse for it, and where a furnace was fixed to the wall of the house, the better opinion in 42 E. III. was that it is not waste, although the termor takes it; and so it seems here, that the executors will take it, and the action is not maintainable.

Eliot. There is a difference when such a thing is fixed by the reversioner, and when the termor; for when it is done by the reversioner, and then he leases it rendering a certain rent, now it is made parcel of the reversion, for it makes the rent which is reserved on such a lease more than it would be if such a fixing had not been made. As where one makes vats and fixes them in a dyehouse or brewhouse, and then leases the house rendering a certain rent, now, by common reason, the rent is the greater, wherefore neither the termor nor the executor will take them; but where they are put in by the termor, he takes them: but here he who had the fee simple fixed this furnace, in which case the executors cannot take it, for the reason aforesaid.

KINGSMILL, [J.] After it is fixed to the freehold, it is incident to the freehold, although it is not parcel of the freehold, and it will go and pass always with the freehold; and although he to whom the freehold belongs after such fixing is outlawed, this furnace will not be distrained nor forfeited, and the reason is because it is annexed and fixed to the freehold; and for this reason the heir will have them after the death of his father, for such posts as are fixed by the father will belong always to the heir, and never to the executors. And where one is seised of land in fee, and buys documents concerning the same land, and dies, in that case the heir will have the documents, and not the executors; and the reason is because they concern the title to the land, although they are but chattels in themselves. And where one has fixed vats in a brewhouse or dyehouse and dies, the heir will have them; for when they are fixed, they are for the continual profit of the house, and therefore there is more reason that the heir should have them, whose is the freehold to which they are joined, than the executors, who have nothing to do with the freehold. But as to the lessee for term of years, if he has fixed such a thing to the ground, and not to the wall, he may well retake it during the term, (but if he lets it after the term, the lessor will take it,) for the taking of it is not any waste, because the house is not injured by it. But in the case here, it seems that the action is maintainable for the reasons aforesaid.

FISHER, [J.,] was of the same opinion.

READ, [C. J.]. The executors will take all kinds of chattels which belonged to their testator, but that is where they are properly in the

nature of chattels; now here when this furnace was annexed and fixed to the land, it is as to a thing of higher nature, and in a way is made incident to it. As in the case that has been put of sleeping tables, the heir will have them after the death of the father, and not the executors; and in reason it follows that when they are joined to the inheritance, it is in accordance with reason that they pass with the inheritance until they are severed by him who has authority to sever them, and that is he in whom is the inheritance. And as to the reason which has been given that the testator might have severed, and given or sold them, and that the executors can in like manner, that is no reason, for the testator could give the trees, and so cannot the executors; and as has been said at the bar, the furnace cannot be attached in assise nor distrained, and so by all the cases aforesaid it seems that the action lies; and so was the opinion of the whole court. *Quod nota.*¹

SQUIER v. MAYER.

BEFORE SIR NATHAN WRIGHT, LORD KEEPER. 1701.

[Reported *Freem. C. C.* 249.]

HELD, that a furnace, though fixed to the freehold, and purchased with the house, and also hangings nailed to the wall, shall go to the executor, and not to the heir, and so determined, contrary to *Herlakenden's Case*, 4 Co., *qu'il dit nest ley quoad præmissa*.²

¹ See *Keilw.* 88, pl. 3; *Henry's Case*, Year Book, 20 Hen. VII. 13, pl. 24.

"*Nota*, reader, Mich. 18 & 19 Devon: it was adjudged in C. B. that waste might be committed in glass annexed to windows, for it is parcel of the house, and shall descend as parcel of the inheritance to the heir, and that the executors should not have them; and although the lessee himself at his own costs put the glass in the windows, yet in being once parcel of the house he could not take it away, or waste it, but he should be punished in waste; and upon the said judgment a writ of error was brought in B. R., and there the judgment was affirmed. *Nota* also, *inter Warner & Fleetwood*, Mich. 41 & 42 Eliz. in C. B., it was resolved *per totam curiam*: that glass annexed to windows by nails, or in other manner, by the lessor or by the lessee, could not be removed by the lessee, for without glass it is no perfect house; and by lease or grant of the house it should pass as parcel thereof, and that the heir should have it, and not the executors; and peradventure great part of the costs of the house consists of glass, which if they be open to tempests and rain, waste and putrefaction of the timber of the house would follow, which agrees with the judgments given before. It was likewise then resolved, that wainscot, be it annexed to the house by the lessor or by the lessee, is parcel of the house; and there is no difference in law if it be fastened by great nails or little nails, or by screws, or irons put through the post or walls (as have been invented of late time); but if the wainscot is by any of the said ways, or by any other, fastened to the posts or walls of the house, the lessee cannot remove it, but he is punishable in an action of waste, for it is parcel of the house; and so by the lease or grant of the house (in the same manner as the ceiling and plastering of the house), it shall pass as parcel of it." *Herlakenden's Case*, 4 Co. 62 a, 63 b (1589).

² See *accord.* *Beck v. Rebow*, 1 P. Wms. 94; *Harvey v. Harvey*, 2 Stra. 1141.

CAVE v. CAVE.

BEFORE SIR NATHAN WRIGHT, LORD KEEPER. 1705.

[Reported 2 Vern. 508.]

A QUESTION arising whether some pictures and glasses belonged to the heir or to the executor: the LORD KEEPER was of opinion,¹ that although pictures and glasses generally speaking are part of the personal estate; yet if put up instead of wainscot, or where otherwise wainscot would have been put, they shall go to the heir. The house ought not to come to the heir maimed and disfigured. *Herlakenden's Case*, wainscot put up with screws shall remain with the freehold.²

LAWTON v. SALMON.

KING'S BENCH. 1782.

[Reported 1 H. Bl. 259 note.]

IN this action of trover, brought by the executor against the tenant of the heir at law of the testator, to recover certain vessels used in salt works, called salt pans, a case was reserved by consent, which stated, that the testator, some years before his death, placed the salt pans in the works; that they were made of hammered iron, and riveted together; that they were brought in pieces, and might be again removed in pieces; that they were not joined to the walls, but were fixed with mortar to a brick floor; that there were furnaces under them; that there was a space for the workmen to go round them; that there were no rooms over them; but that there were lodgings at the end of the wych houses; that they might be removed without injuring the buildings, though the salt works would be of no value without them, which with them were let for £8 per week.

The question was, whether the executor or the heir at law were entitled to them?

Mingay, for the plaintiff.

Davenport, for the defendant.

LORD MANSFIELD, after stating the case, said: All the old cases, some of which are in the Year-Books, and Brooke's Abridgment agree that whatever is connected with the freehold, as wainscot, furnaces, pictures fixed to the wainscot, even though put up by the tenant, belong to the heir. But there has been a relaxation of the strict rule in that

¹ Only that part of the case which relates to fixtures is here given.

² See *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382; *Snedeker v. Warring*, 12 N. Y. 170; *Ward v. Kilpatrick*, 85 N. Y. 413; *Norton v. Dashwood*, [1896] 2 Ch. 497.

species of cases, for the benefit of trade, between landlord and tenant, that many things may now be taken away, which could not be formerly, such as erections for carrying on any trade, marble chimney-pieces and the like, when put up by the tenant. This is no injury to the landlord, for the tenant leaves the premises in the same state in which he found them, and the tenant is benefited. There has been also a relaxation in another species of cases between tenant for life and a remainder-man, if the former has been at any expense for the benefit of the estate, as by erecting a fire-engine, or anything else by which it may be improved; in such a case it has been determined that the fire-engine should go to the executor, on a principle of public convenience being an encouragement to lay out money in improving the estate, which the tenant would not otherwise be disposed to do. The same argument may be applied to the case of tenant for life and remainder-man, as that of landlord and tenant, namely, that the remainder-man is not injured, but takes the estate in the same condition as if the thing in question had never been raised.

But I cannot find, that between heir and executor, there has been any relaxation of this sort, except in the case of the cider-mills, which is not printed at large. The present case is very strong. The salt spring is a valuable inheritance, but no profit arises from it, unless there is a salt work; which consists of a building, &c. for the purpose of containing the pans, &c. which are fixed to the ground. The inheritance cannot be enjoyed without them. They are accessories necessary to the enjoyment and use of the principal. The owner erected them for the benefit of the inheritance; he could never mean to give them to the executor, and put him to the expense of taking them away, without any advantage to him, who could only have the old materials, or a contribution from the heir, in lieu of them. But the heir gains £8 per week by them. On the reason of the thing, therefore, and the intention of the testator, they must go to the heir. It would have been a different question if the springs had been let, and the tenant had been at the expense of erecting these salt works; he might very well have said, "I leave the estate no worse than I found it." That, as I stated before, would be for the encouragement and convenience of trade, and the benefit of the estate. Mr. Wilbraham, in his opinion, takes the distinction between executor and tenant. For these reasons, we are all of opinion, that the salt pans must go to the heir.

*Postea to the defendant.*¹

¹ "In former times it has been said that the heir was a favored person; but, in my opinion, no distinction can be maintained between a claim by the executor against the heir and a claim by the executor against the devisee." *Chitty, J.*, in *Norton v. Dashwood*, [1896] 2 Ch. 497, 500.

WINN v. INGILBY.

KING'S BENCH. 1822.

[Reported 5 B. & Ald. 625.]

TRESPASS for breaking and entering plaintiff's house, and taking his fixtures, goods, and chattels. Justification under a writ of *fi. fa.* directed to the defendant, Ingilby, as sheriff of the county, under which the defendant, Hauxwell, his bailiff, peaceably entered the premises, and seized, &c. Replication *de injuria*, &c. At the trial at the last assizes for Yorkshire, before Cross, Serjeant, the only question was, whether the defendants were justified in seizing, under the execution, some fixtures, consisting of set pots, ovens, and ranges. It appeared that the house where these were fixed was built on the plaintiff's own freehold, and the learned serjeant was of opinion that under these circumstances they were not seizable by the sheriff under an execution.

The plaintiff accordingly had a verdict; and now

Littledale moved to enter a verdict for the defendants.

PER CURIAM. The verdict is right, for these were fixtures which would go to the heir, and not to the executor, and they were not liable to be taken as goods and chattels under an execution. Here, the house where they were fixed was the freehold of the plaintiff, which distinguishes this case from those cited.

Rule refused.

THE KING v. OTLEY.

KING'S BENCH. 1830.

[Reported 1 B. & Ad. 161.]

UPON appeal against an order of two justices, whereby Samuel Stammers and his four children were removed from the parish of St. Mary, Lambeth, in the county of Surrey, to the parish of Otley, in the county of Suffolk, the sessions confirmed the order, subject to the opinion of this court on the following case:—

Samuel Stammers, the pauper, rented of James Bedwell, of Ipswich, carpenter, in the appellant parish, a windmill called a smock-mill, a brick-built cottage, and a small garden, at the rent of £30 per annum, during the space of six years, and three quarters of another year, ending midsummer, 1827; and during the whole of that time held, occupied, and actually paid for the same the said sum of £30 per annum, and was rated to and paid several rates for the relief of the poor of the parish of Otley in respect of the cottage and garden, and also of the mill, at the estimated value of £6 per annum. The cottage and garden, with the mill, are together of more than the annual value

of £10, but the cottage and garden, exclusively of the mill, are not of that annual value. The mill is of a circular form, and of wood, having a foundation of brick twelve inches high from the ground, in which the wood-work is not inserted, but rests upon it by its own weight alone. No part of the machinery of the mill touches the ground or any part of the foundation; the whole is confined to the wooden part of it, which has two floors; but on the ground within the brick foundation, planks are laid down so as to form a flooring, and the mill would work as well upon the ground as upon the brick foundation. Some time after the erection of the mill, the tenant placed mortar on the inside and outside of the sill or bottom part of the wood-work of the mill, for the purpose of excluding the weather, mortar so placed not acting as a cement between wood and brick work; and he also fixed posts in the ground, which, sloping towards the mill, supported steps by which the mill was entered. The question for the opinion of the court was, Whether the mill in question was a tenement, by the renting of which the pauper could acquire a settlement in Otley?

Thesiger, in support of the order of sessions.

Barnewall and Ross, *contra*.

BAYLEY, J. The question is, Whether the mill be parcel of a tenement? To be so, it must be part and parcel of the freehold. Now, it is not parcel of the freehold unless it be affixed to it, or to something previously connected with it. Here the mill was not affixed to the land, but merely rested on a foundation of brick. The sessions have found that if it had stood upon the ground, it would have worked as well. If it had, the only difference would have been, that it probably would have rotted. This is analogous to the case of a barn set upon pillars; and that is nothing more than a chattel. The windmill in this case would clearly have gone to the executor, and not to the heir.

LITLEDALE, J. This is precisely within the case of *The King v. The Inhabitants of Londonthorpe*, 6 T. R. 377. It is attempted to be distinguished, because the tenant in that case had permission from the landlord to put up the mill, and it was treated by both as a chattel; but that circumstance can make no difference. Suppose there were two mills in two distinct townships, and one of the townships treated the mill as a tenement, and the other, as a mere chattel. That would make no difference. It must depend upon the nature of the building, and not upon the mode of treating it, whether it be a tenement or not.

PARKE, J. I am of the same opinion. To constitute a tenement, it is necessary that the structure should be affixed to the soil, or to something annexed to the soil. Here the windmill rested merely upon the brick foundation, without being annexed to it by cement.

*Order of sessions quashed.*¹

¹ "We are aware that in England, by some, if not by most, of their cases, where wooden buildings are erected on brick or stone foundations, and are not let into or fastened to the brick or stone work, and are only held to their places by their own weight, they have been held to be personal property only. *Rex v. Otley*, 1 Barn. &

EX PARTE ASTBURY.

COURT OF APPEAL IN CHANCERY. 1869.

[Reported L. R. 4 Ch. 630.]

THIS case came before the court on appeal from an order of *Mr. Registrar Tudor*, acting for the Commissioner of the Birmingham Court of Bankruptcy, made on a special case submitted for his decision.

It appeared from the special case that on the 28th of June, 1867, the firm of Messrs. Job Richards & Co., iron manufacturers at Smethwick, which comprised the present bankrupts, Job Richards and Richard Hill, and also T. and L. Jenkins, being at that time indebted to Lloyd's Banking Company, Limited, deposited with them the lease of their rolling mills at Smethwick, accompanied by a memorandum in the following terms:—

“Memorandum. We, the undersigned, Job Richards, L. Jenkins, Richard Hill, and Thomas Jenkins, trading together as iron-masters at Smethwick, in the county of Stafford, under the style or firm of Job Richards & Co., have this day deposited with Lloyd's Banking Company, Limited, the deed mentioned in the schedule hereunder written, to be retained by the company by way of a continuing security to them for payment on demand of all moneys and liabilities already paid or incurred, or which the company may at any time advance, pay, or incur to or for the said firm of Job Richards & Co., whether on current account or by the discount of or otherwise in respect of bills of exchange, promissory notes, or other negotiable securities drawn, accepted, or indorsed by the said firm, together with interest, commission, banking charges, law and other costs, charges, and expenses; and for a more effectual security we undertake at our own expense, when required by the company, that we and all other necessary parties will execute to the said company, or as they shall direct, a mortgage of all our estate and interest in the said deed, which mortgage shall contain a power of sale and all usual clauses.”

The account was continued as an open account with the four partners up to the month of August, 1867, when the partnership between the bankrupts and Messrs. Jenkins was dissolved, and the bankrupts took the assets and debts of the old firm, including a balance of upwards of £10,000 due to Lloyd's Banking Company.

On the 11th of January, 1868, the bankrupts executed to the banking company a legal mortgage of the mills; and on the 18th of January

Adol. 161, and *Wansborough v. Maton*, 4 Adol. & Ellis, 844, are cases of this sort. But this has never been considered as the law with us, and to hold it to be so at this day would in effect change the character of very many, if not of most, of the wooden buildings in the State, from real estate into mere personal chattels.” *Landon v. Platt*, 34 Conn. 517, 524. See *Snedeker v. Warring*, 12 N. Y. 170.

the banking company took possession under the mortgage. On the 30th of January a petition of bankruptcy was filed against them, and they were declared bankrupts, and Messrs. Astbury, Bloomer, and Dickenson were appointed assignees.

The mortgage deed had a schedule annexed to it, containing a list of certain chattels used in the rolling mills, which were the subject of the present dispute between the assignees and the mortgagees. These chattels consisted of a considerable number of iron rollers described as finishing rolls, colting rolls, guide rolls, hard rolls, and bolting down rolls; and also four patent weighing machines, and four straightening plates.

It was admitted in the special case that the rolls and other chattels comprised in the last-mentioned schedule were necessary to the carrying on of the bankrupt's business. If they had been removed, others of a similar description must have been substituted.

The assignees contended that the mortgage security was void against them so far as related to the duplicate rolls and other unfixed machinery and chattels.

It was admitted in the argument that the mortgage deed of the 11th of January, 1868, could not be supported against the assignees, by reason of its having been made on the eve of bankruptcy; but the mortgagees claimed the chattels as fixtures attached to the iron mills, under the equitable mortgage and deposit of the 28th of June, 1867. The assignees admitted that one set of rolls passed with the machine to the equitable mortgagees. Evidence was adduced before the registrar as to the nature of the chattels, in which the following facts were proved:—

The rolls were loose iron rollers, which were fitted into the rolling machine. The machines, when made, were fitted with one set of rollers, and others were ordered and supplied according to the work required, different sized rolls being used for different descriptions of iron. When the rolls first came from the manufacturer they had to be fitted to their bearings in the machines by filing their ends, and when so fitted they were grooved according to the size of the iron which they were intended to roll. At the date of the equitable mortgage there were several duplicate rolls which had been used or were ready for use, and others which had been supplied by the manufacturers, but had never been fitted to the machine.

There were four weighing machines, which were placed in holes dug in the ground and faced with brickwork. The machines rested on the brickwork at the bottom of the holes, the weighing plates being on a level with the surface of the ground. It was stated in the evidence that the machines might be removed without injuring the brickwork, and that similar machines were often placed upon wheels instead of resting on the ground.

The straightening plates were broad plates of iron for straightening the bars of iron when taken out of the furnace. They were laid on

brickwork and bedded in the earth of the floor, and the rest of the flooring was composed of iron plates, which fitted round them so as to make an even surface.

The Registrar was of opinion that the rolls passed with the mills to the mortgagees, as being part of the machinery; from this decision the assignees appealed. But he held that the weighing machines and straightening plates did not pass; and the mortgagees appealed from this decision.

Mr. Jessel, Q. C., *Mr. Little*, Q. C., and *Mr. Archibald Smith*, for the assignees, the appellants in the first appeal.

Mr. Fry, Q. C., and *Mr. Finlay Knight*, for the respondents, the mortgagees.

SIR G. M. GIFFARD, L. J. The questions in cases of this description are, for the most part, much more questions of fact than of law, for to my mind the law has been settled, but the facts necessarily differ more or less in each particular case.

With respect to the law, it is admitted that where there is a mortgage of a manufactory, and part of the machinery used in it is a fixture, that part passes. We have, therefore, to determine what, according to the law, are, in a proper sense, fixtures. There are two *dicta* which will be sufficient to guide us for the present purpose. In *Mather v. Fraser* it was decided that the article must be an essential part of the machine. I think that was all that it was necessary to lay down in that case. The *dictum* of Lord Cottenham in *Fisher v. Dixon*, 12 Cl. & F. 312, was that all "belonging to the machine" would pass; and I should say in this case the proper test to lay down would be that the chattel must be "something which belongs to the machine as part of it."

Now, these machines were rolling machines, and there appear to be connected with rolling machines parts which, beyond all doubt, are not fixed, in the strict sense of the term; but it is in evidence that if a machine is ordered, it is sent with one set of rolls, and it is quite manifest that without rolls the machine could not do any part of the work for which it is made. One set of rolls clearly passes. But we have here duplicate rolls, and with reference to them — I am not now speaking of rolls which can be considered as, in any sense, unfinished, but of duplicate rolls which have been actually fitted to the machine — I cannot see why, if one set of rolls passes, the duplicate rolls should not pass also. It comes, in fact, to this, that the machine with one set of rolls is a perfect machine, but the machine with a duplicate set is a more perfect machine. I think, therefore, that each set of rolls necessarily belongs to the machine as part of it. I do not think that this is at all affected by the *dictum* of Fitzherbert; but if it was, my answer would be, that this subject has been considered much more of late years than it was in olden times, and that the matter decided was with regard to a question of distress. If it were desired to reduce the question to an absurdity, it would be by supposing a case of duplicate latch keys to a door, and holding that one only should pass, and not the

other. The fact is, that whether there is one set of rolls or a duplicate set, they are each part and parcel of the machine, and come within the term "belonging to the machine as part of it."

Then comes the case as to the different sizes of rolls. But if the duplicates of the same size pass, it follows that the rolls of different sizes pass, if they render the machine still more perfect than if the rolls were all of the same size.

Then we come to another and different class of rolls, and there I confess I differ from the registrar who has given his opinion in this case. I allude to those rolls which had been made for the purpose of being used in this machine, and had been sent to the mill for that purpose, but had never been fitted to the machine, and which required something more to be done to fit them to the machine in order that they might be used in it. I think that if a man mortgages a machine, and afterwards, the machine itself being perfect, and fitted with rolls and everything else connected with it, other rolls are sent for to be used with the machine, but those rolls cannot be used unless and until they are fitted to the machine, it would be going a long way to say that the mortgagor should be compelled to fit those rolls to the machine, and should be precluded from saying that they do not form a part of the machine.

Therefore I am of opinion that, as regards the duplicate rolls, as regards the rolls of different sizes, as regards all the rolls which have been actually fitted to the machine, they belong to the machine as part of the machine, — they are, in fact, essential parts of the machine. But I cannot hold that the rolls which have never been fitted to the machine, and have never been used in the machine, and which require something more to be done to them before they are fitted to the machine, belong to the machine, or that they are essential parts of it. Therefore, in that respect the order will be varied.

The second appeal was then argued.

SIR G. M. GIFFARD, L. J. The two points which remain to be disposed of in this question are, first, as to the straightening plates; and, secondly, as to the weighing machines. I cannot agree to the suggestion of Mr. Jessel that because the mortgagor in this case was a leaseholder and not a freeholder the articles which are fixtures will not pass to the mortgagee. Whether he is a freeholder or a leaseholder, the same rule clearly and indubitably would apply, and the only question is, whether the straightening plates and the weighing machines are fixtures.

With regard to the straightening plates, two cases were cited, one of the *Metropolitan Counties Society v. Brown* [26 Beav. 454], and another of *Beaufort v. Bates* [3 De G., F. & J. 381]. The latter case clearly has no application, for that was a case in which, there being chattels which, as between the lessor and lessee, the lessee might remove, an execution creditor of the lessee was held entitled to take them. As regards the former case, the point was wholly different

from the point in this case, because there the straightening plates certainly were not fixed in the mode in which these straightening plates appear from the evidence to be fixed. It is only necessary to read some portions of the evidence to show that these straightening plates are clearly fixtures, and, in fact, just as much part of the floor as any pavement would be, and, certainly, it would be astonishing to me if an ordinary pavement were regarded as a thing that could be removed by a mortgagor as against his mortgagee. [His Lordship then referred to the evidence, and continued:] Upon this evidence I must assume that the plates round the straightening plates are part of the ordinary floor of the place, and that the straightening plates are just as much part of the ordinary floor as the plates around them. I look upon these straightening plates as in the same position as a flagstone laid down and let in, and certainly if anything in the world is a fixture I should conceive that a flagstone laid down and let in would be a fixture. In fact, the registrar seems to have fallen into this mistake by laying rather too much stress on what was said in the case of *Mather v. Fraser*, 2 K. & J. 536, as to nothing being a fixture which could stand by its own weight. No doubt a flat plate will rest by its own weight, but if you have it laid in, embedded, and overlaid with that which is part of the permanent floor, and the permanent floor cannot be removed without damage to the freehold, as it clearly cannot be here, I can have no doubt whatever but that the straightening plates are fixtures.

But, then, with regard to the weighing machines, I think the case is wholly different. The evidence is clear that weighing machines of this description are frequently put upon wheels, and are so used. As regards these weighing machines, it appears that where they are placed inside the building the floor is prepared for them, and where they are placed outside the soil is prepared for them; that is to say, a square receptacle is made and is bricked, and when that square receptacle is made and bricked, the weighing machine is placed in it, and may, of course, be taken out again, for it is not fixed by nails, or by screws, or in any other way. One of the witnesses says: "I took a piece of thin iron about half an inch thick, and trickled around the outside of it, and from that I could see there was some brickwork put up in order to secure the outside; there was a space all round of from five-eighths to three-fourths of an inch." Mr. Fry argued that the brickwork was the same thing as if there had been a frame, and that the brickwork is part and parcel of the machine. To that argument I cannot assent. Suppose in this case a number of brick places had been made, into which it had been convenient to put weights, beyond all doubt the weights would not have been fixtures. In the same way, if there had been a foundation of granite for a cannon or a large telescope, neither the cannon nor the large telescope would be a fixture. The preparation of the soil does not make the machine a fixture, nor does the fact of its being put into the receptacle so prepared for it make it a fixture.

Therefore, as regards the straightening plates the decision below will be reversed, and as regards the weighing machines it will be affirmed. There will be no costs of the appeal, and the deposit will be returned.¹

HOLLAND v. HODGSON.

EXCHEQUER CHAMBER. 1872.

[Reported L. R. 7 C. P. 328.]

BLACKBURN, J.² In this case George Mason, who was owner in fee of a mill occupied by him as a worsted mill, mortgaged the mill and all fixtures which then were, or at any time thereafter should be set up and affixed to the premises, in fee to the plaintiffs. The mortgage deed was not registered as a bill of sale, and Mason, who continued in possession, assigned all his estate and effects to the defendants as trustees for the benefit of his creditors. The defendants under this last

¹ In *Hellawell v. Eastwood*, 6 Ex. 295 (1851), the question was whether "certain cotton spinning-machines, called 'mules,' some of which were fixed by screws to the wooden floor, and some by screws which had been sunk into holes in the stone flooring, and secured by molten lead poured into them," were distrainable for rent. It was held that they were distrainable. Parke, B., delivering the opinion of the court, said: "The only question, therefore, is, whether the machines when fixed were parcel of the freehold; and this is a question of fact, depending on the circumstances of each case, and principally on two considerations: first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed, *integre, salve, et commode*, or not, without injury to itself or the fabric of the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the Civil Law, *perpetui usus causa*, or in that of the Year-Book, *pour un profit del inheritance* (20 Hen. 7, 13), or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel.

"Now in considering this case, we cannot doubt that the machines never became a part of the freehold. They were attached slightly, so as to be capable of removal without the least injury to the fabric of the building or to themselves; and the object and purpose of the annexation was, not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels. They were never a part of the freehold, any more than a carpet would be which is attached to the floor by nails for the purpose of keeping it stretched out, or curtains, looking-glasses, pictures, and other matters of an ornamental nature, which have been slightly attached to the walls of the dwelling as furniture, and which is probably the reason why they and similar articles have been held, in different cases, to be removable. The machines would have passed to the executor. (*Per* Lord Lyndhurst, C. B., *Trappes v. Harter*, 2 C. & M. 177.) They would not have passed by a conveyance or demise of the mill. They never ceased to have the character of movable chattels, and were therefore liable to the defendants' distress. The plaintiff's rule is, therefore, discharged, and the defendants' rule is absolute." And so *Murdock v. Gifford*, 18 N. Y. 28.

See *Fisher v. Dixon*, 12 Cl. & F. 312; *Walmsley v. Milne*, 7 C. B. (n. s.) 115; *Bain v. Brand*, 1 Ap. Cas. 762; *Sheffield & South Yorkshire Society v. Harrison*, 15 Q. B. 358.

² The opinion only is given; it states the case sufficiently.

deed took possession of everything. The plaintiffs brought trover. The defendants paid money into court, and there was a replication of damages ultra. A case was stated showing the nature of the articles, and how and in what manner they were affixed to the mill. As the deed was not registered under the Bills of Sales Act (17 & 18 Vict. c. 36), it was by § 1 of that Act void as against the defendants as assignees for the benefit of creditors so far as it was a transfer of "personal chattels" within the meaning of that Act; and as by § 7 the phrase "personal chattels" is declared in that Act to mean *inter alia* "fixtures," it was void (as against these defendants) so far as it was a transfer of fixtures as such. Since the decision of this court in *Climie v. Wood*, Law Rep. 4 Ex. 328, it must be considered as settled law (except, perhaps, in the House of Lords) that what are commonly known as trade or tenant's fixtures form part of the land, and pass by a conveyance of it; and that though if the person who erected those fixtures was a tenant with a limited interest in the land, he has a right, as against the freeholder, to sever the fixtures from the land; yet if he be a mortgagor in fee, he has no such right as against his mortgagee. Trade and tenant's fixtures are, in the judgment in that case, accurately defined as "things which are annexed to the land for the purposes of trade or of domestic convenience or ornament in so permanent a manner as to become part of the land, and yet the tenant who has erected them is entitled to remove them during his term, or it may be within a reasonable time after its expiration." It was not disputed at the bar that such was the law; and it was admitted, and we think properly admitted, that where there is a conveyance of the land, the fixtures are transferred, not as fixtures, but as part of the land, and the deed of transfer does not require registration as a bill of sale. But we wish to guard ourselves by stating that our decision (so far as regards the registration) is confined to the case before us, where the mortgagor was owner to the same extent of the fixtures and of the land. If a tenant having only a limited interest in the land, and an absolute interest in the fixtures, were to convey not only his limited interest in the land and his right to enjoy the fixtures during the term, so long as they continued a part of the land, but also his power to sever those fixtures and dispose of them absolutely, a very different question would have to be considered. As it does not arise, we decide nothing as to this. We are not to be understood as expressing dissent from what appears to have been the opinion of Wood, V. C., in *Boyd v. Shorrocks*, Law Rep. 5 Eq. 72, but merely as guarding against being supposed to confirm it. In *Climie v. Wood* the jury had found as a fact that the articles there in question were tenant fixtures, and that finding was not questioned. Neither the Court of Exchequer nor the Court of Exchequer Chamber had occasion there to consider what would constitute a fixture. In the present case there is no such finding. The controversy was confined to the looms, the nature of which and the mode of their annexation were described in the case. In the court below it was properly admitted

that there was no real distinction between those looms and the articles which the Court of Queen's Bench, in *Longbottom v. Berry*, Law Rep. 5 Q. B. 123, decided to be so annexed as to form part of the land. Judgment was accordingly given for the plaintiffs, without argument, leaving the defendants to question *Longbottom v. Berry* in a court of error.

The present case is therefore really, though not in form, an appeal against the decision of the Court of Queen's Bench in *Longbottom v. Berry*, and was so argued. There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz., the degree of annexation and the object of the annexation. When the article in question is no further attached to the land than by its own weight, it is generally to be considered a mere chattel; see *Wiltshier v. Cottrell*, 1 E. & B. 674; 22 L. J. Q. B. 177, and the cases there cited. But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land: see *D'Eyncourt v. Gregory*, Law Rep. 3 Eq. 382. Thus blocks of stone placed one on the top of another without any mortar or cement, for the purpose of forming a dry stone wall, would become part of the land though the same stones, if deposited in a builder's yard and for convenience' sake stacked on the top of each other in the form of a wall, would remain chattels. On the other hand, an article may be very firmly fixed to the land, and yet the circumstances may be such as to show that it was never intended to be part of the land, and then it does not become part of the land. The anchor of a large ship must be very firmly fixed in the ground in order to bear the strain of the cable; yet no one could suppose that it became part of the land, even though it should chance that the ship-owner was also the owner of the fee of the spot where the anchor was dropped. An anchor similarly fixed in the soil for the purpose of bearing the strain of the chain of a suspension bridge would be part of the land. Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel. This last proposition seems to be in effect the basis of the judgment of the Court of Common Pleas delivered by Maule, J., in *Wilde v. Waters*, 16 C. B. 637; 24 L. J. C. P. 193. This, however, only removes the difficulty one step, for it still remains a question in

each case whether the circumstances are sufficient to satisfy the onus. In some cases, such as the anchor of the ship or the ordinary instance given of a carpet nailed to the floor of a room, the nature of the thing sufficiently shows it is only fastened as a chattel temporarily, and not affixed permanently as part of the land. But ordinary trade or tenant fixtures which are put up with the intention that they should be removed by the tenant (and so are put up for a purpose in one sense only temporary, and certainly not for the purpose of improving the reversionary interest of the landlord) have always been considered as part of the land, though severable by the tenant. In most, if not all, of such cases the reason why the articles are considered fixtures is probably that indicated by Wood, V. C., in *Boyd v. Shorrocks*, that the tenant indicates by the mode in which he puts them up that he regards them as attached to the property during his interest in the property. What we have now to decide is as to the application of these rules to looms put up by the owner of the fee in the manner described in the case. In *Hellawell v. Eastwood*, 6 Ex. 295; 20 L. J. Ex. 154 (decided in 1851), the facts as stated in the report are, that the plaintiff held the premises in question as tenant of the defendants, and that a distress for rent had been put in by the defendants under which a seizure was made of cotton-spinning machinery called "mules," some of which were fixed by screws to the wooden floor, and some by screws which had been sunk in the stone floor, and secured by molten lead poured into them. It may be inferred that the plaintiff, being the tenant only, had put up those mules; and from the large sum for which the distress appears to have been levied (£2000), it seems probable that he was the tenant of the whole mill. It does not appear what admissions, if any, were made at the trial, nor whether the court had or had not by the reservation power to draw inferences of fact, though it seems assumed in the judgment that they had such a power. Parke, B., in delivering the judgment of the court, says: "This is a question of fact depending on the circumstances of each case, and principally on two considerations: first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed *integre, salve, et commode*, or not, without injury to itself or the fabric of the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the civil law *perpetui usus causa*, or in that of the Year-Book, *pour un profit del inheritance*, or merely for a temporary purpose and the more complete enjoyment and use of it as a chattel." It was contended by Mr. Field that the decision in *Hellawell v. Eastwood* had been approved in the Queen's Bench in the case of *Turner v. Cameron*, Law Rep. 5 Q. B. 306. It is quite true that the court in that case said that it afforded a true exposition of the law as applicable to the particular facts upon which the judgment proceeded; but the court expressly guarded their approval by citing from the judgment delivered by Parke, B., the facts upon which they considered it to have pro-

ceeded: "They were attached slightly, so as to be capable of removal without the least injury to the fabric of the building or to themselves, and the object of the annexation was not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels." As we have already observed, trade or tenant fixtures might in one sense be said to be fixed "merely for a temporary purpose;" but we cannot suppose that the Court of Exchequer meant to decide that they were not part of the land, though liable to be severed by the tenant.

The words "merely for a temporary purpose" must be understood as applying to such a case as we have supposed, of the anchor dropped for the temporary purpose of mooring the ship, or the instance immediately afterwards given by Parke, B., of the carpet tacked to the floor for the purpose of keeping it stretched whilst it was there used, and not to a case such as that of a tenant who, for example, affixes a shop counter for the purpose (in one sense temporary) of more effectually enjoying the shop whilst he continues to sell his wares there. Subject to this observation, we think that the passage in the judgment in *Hellawell v. Eastwood* does state the true principles, though it may be questioned if they were in that case correctly applied to the facts. The court in their judgment determine what they have just declared to be a question of fact thus: "The object and purpose of the connection was not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels." Mr. Field was justified in saying, as he did in his argument, that as far as the facts are stated in the report, they are very like those in the present case, except that the tenant who put the mules up cannot have been supposed to intend to improve the inheritance (if by that is meant his landlord's reversion), but only at most to improve the property whilst he continued tenant thereof; and he argued with great force that we ought not to act on a surmise that there were any special facts or findings not stated in the report, but to meet the case, as showing that the judges who decided *Hellawell v. Eastwood* thought that articles fixed in a manner very like those in the case before us remained chattels; and this is felt, by some of us, at least, to be a weighty argument. But that case was decided in 1851. In 1853 the Court of Queen's Bench had, in *Wiltshier v. Cottrill*, to consider what articles passed by the conveyance in fee of a farm. Among the articles in dispute was a threshing machine, which is described in the report thus: "The threshing machine was placed inside one of the barns (the machinery for the horse being on the outside), and there fixed by screws and bolts to four posts which were let into the earth." *Hellawell v. Eastwood* was cited in the argument. The court (without, however, noticing that case) decided that the threshing machine, being so annexed to the land, passed by the conveyance. It seems difficult to point out how the threshing machine was more for the improvement of the inheritance of the farm than the present looms were for the improvement of the manufactory; and in *Mather v. Fraser*,

2 K. & J. 536; 25 L. J. Ch. 361, Wood, V. C., who was there judge both of the fact and the law, came to the conclusion that machinery affixed not more firmly than the articles in question by the owner of the fee to land, for the purpose of carrying on a trade there, became part of the land. This was decided in 1856. And in *Walmsley v. Milne*, 7 C. B. (N. S.) 115; 29 L. J. C. P. 97, the Court of Common Pleas, after having their attention called to a slight misapprehension by Wood, V. C., of the effect of *Hellawell v. Eastwood*, came to the conclusion, as is stated by them, at p. 181, "that we are of opinion, as a matter of fact, that they were all firmly annexed to the freehold for the purpose of improving the inheritance, and not for any temporary purpose. The bankrupt was the real owner of the premises, subject only to a mortgage which vested the legal title in the mortgagee until the repayment of the money borrowed. The mortgagor first erected baths, stables, and a coach-house, and other buildings, and then supplied them with the fixtures in question for their permanent improvement. As to the steam-engine and boiler, they were necessary for the use of the baths. The hay-cutter was fixed into a building adjoining the stable as an important adjunct to it, and to improve its usefulness as a stable. The malt-mill and grinding stones were also permanent erections, intended by the owner to add to the value of the premises. They therefore resemble in no particular (except being fixed to the building by screws) the mules put up by the tenant in *Hellawell v. Eastwood*." It is stated in a note to the report of the case that, on a subsequent day, it was intimated by the court that Mr. Justice Willes entertained serious doubts as to whether the articles in question were not chattels. The reason of his doubt is not stated, but probably it was from a doubt whether the Exchequer had not, in *Hellawell v. Eastwood*, shown that they would have thought that the articles were not put up for the purpose of improving the inheritance, and from deference to that authority. The doubt of this learned judge in one view weakens the authority of *Walmsley v. Milne*, but in another view it strengthens it, as it shows that the opinion of the majority, that as a matter of fact the hay-cutter, which was not more firmly fixed than the mules in *Hellawell v. Eastwood*, must be taken to form part of the land, because it was "put up as an adjunct to the stable, and to improve its usefulness as a stable," was deliberately adopted as the basis of the judgment; and it is to be observed that Willes, J., though doubting, did not dissent. *Walmsley v. Milne* was decided in 1859. This case and that of *Wiltshier v. Cottrell* seem authorities for this principle, that where an article is affixed by the owner of the fee, though only affixed by bolts and screws, it is to be considered as part of the land, at all events where the object of setting up the articles is to enhance the value of the premises to which it is annexed for the purposes to which those premises are applied. The threshing machine in *Wiltshier v. Cottrell* was affixed by the owner of the fee to the barn as an adjunct to the barn, and to improve its usefulness as a barn, in much the same sense as the

hay-cutter in *Walmsley v. Milne* was affixed to the stable as an adjunct to it, and to improve its usefulness as a stable. And it seems difficult to say that the machinery in *Mather v. Fraser* was not so much affixed to the mill as an adjunct to it and to improve the usefulness of the mill as such, as either the threshing machine or the hay-cutter. If, therefore, the matter were to be decided on principle, without reference to what has since been done on the faith of the decisions, we should be much inclined, notwithstanding the profound respect we feel for everything that was decided by Parke, B., to hold that the looms now in question were, as a matter of fact, part of the land. But there is another view of the matter which weighs strongly with us. *Hellawell v. Eastwood* was a decision between landlord and tenant, not so likely to influence those who advance money on mortgage as *Mather v. Fraser*, which was a decision directly between mortgagor and mortgagee. We find that *Mather v. Fraser*, which was decided in 1856, has been acted upon in *Boyd v. Shorrocks* by the Court of Queen's Bench in *Longbottom v. Berry*, and in Ireland in *Re Dawson*, Ir. Law Rep. 2 Eq. 222. These cases are too recent to have been themselves much acted upon, but they show that *Mather v. Fraser* has been generally adopted as the ruling case. We cannot, therefore, doubt that much money has, during the last sixteen years, been advanced on the faith of the decision in *Mather v. Fraser*. It is of great importance that the law as to what is the security of a mortgagee should be settled; and without going so far as to say that a decision only sixteen years old should be upheld, right or wrong, on the principle that *communis error facit jus*, we feel that it should not be reversed unless we clearly see that it is wrong. As already said, we are rather inclined to think that if it were *res integra* we should find the same way. We think, therefore, that the judgment below should be affirmed.

*Judgment affirmed.*¹

NOBLE v. BOSWORTH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1837.

[Reported 19 Pick. 314.]

SHAW, C. J. It will probably not be necessary to go much at large into the facts of this case, to explain the only material principle of law on which it is decided. The action is trespass for taking and carrying away one iron kettle and two copper kettles. There are two counts: one, *quare clausum*, charging the taking away of the kettles as aggravation; the other, *de bonis asportatis*, in which the *gravamen* is, the taking away and converting the same kettles.

The defendant, by deed of June 4th, 1835, duly executed, acknowl-

¹ See *Chidley v. Churchwardens of West Ham*, 32 L. T. (N. S.) 486.

edged and delivered, conveyed to the plaintiff a parcel of real estate, on which was a dye-house, and in that dye-house were the kettles in question. They were firmly set in brickwork, and constituted a valuable part of the estate, and were a part of the realty. By mutual agreement, the grantor retained possession till April, 1836, at about which time the kettles were taken down by the defendant and removed. The deed conveys the premises, including the dye-house and appurtenances, but making no mention of the kettles, either by expressly excepting or including them. The deed was not delivered at the time of its date, and probably not till some months after; but this is not material.

The defence relied upon was, that at the time the bargain was made for a sale of the premises, by the defendant to the plaintiff, June 4th, 1835, it was agreed by Bosworth, the owner of the dye-house, with one Chapin, to sell him the three kettles, that this was known to Noble, and it was understood and agreed, that by the deed from Bosworth to Noble, the kettles were not intended to be conveyed, and that although the agreement between Bosworth and Chapin from accidental causes fell through and was not executed, yet that the property in the kettles remained in the defendant, and did not pass by his deed to the plaintiff.

This presents two questions: first, whether the deed, by its ordinary effect and operation, transferred the property in these dye-kettles; and if so, then secondly, whether that effect can be controlled by the parol agreement made before or at the time of the delivery of the deed, that the kettles should not be considered as included in the deed.

As to the first, whatever doubt there might be, if kettles were erected in like manner by a tenant on the leased premises, for the purposes of his trade, or by a mortgagor after the estate had been mortgaged, we have no doubt, that where an owner erects a dye-house on his own land, and sets up dye-kettles therein, firmly secured in brick work, they become part of the realty, and pass by a deed of the land without express words. The legal effect and operation of such a deed is to vest the entire right and property in the kettles in the grantee. *Union Bank v. Emerson*, 15 Mass. R. 159.

2. Then is it competent for the grantor to control or restrain this legal effect, by proof of a parol agreement, made previously to or at the time of the delivery of the deed? The court are all of opinion, that it is not. It would be as well contrary to the general rule of the common law, which provides that the terms of an instrument in writing shall not be altered or controlled by a parol agreement, as against the provision of the Statutes, which requires that all rights and interests in real estate, shall be manifested by some instrument in writing, and that no action shall be brought on any agreement for the sale of lands, or any interest in or concerning the same, unless in writing. St. 1783, c. 37, §§ 1, 2, 3. It is as much against these rules to admit parol evidence, to prevent or restrain the legal inferences and consequences of a deed, as to control and alter its express provisions.

Pattison v. Hull, 9 Cowen, 754. A deed passes all the incidents to the land as well as the land itself, and as much when not expressed, as when they are. If the parol agreement were made before the execution and delivery of the deed, it is to be regarded as part of the negotiation and discussion respecting the terms of the purchase and sale, which is considered as merged and embodied in the deed itself as the final and authoritative expression of the agreement and determination of the parties on the subject. If it was made at the time of the delivery of the deed, then it must be deemed an exception, reservation or defeasance, and being repugnant to the terms and effect of the deed, it is void.

For these reasons, the court are of opinion, that the verdict, which was for the defendant, must be set aside, and a new trial granted.¹

Lathrop, I. C. Bates, and Forbes, for the defendant.

Wells, Alvord, and W. G. Bates, contra.

PEIRCE v. GODDARD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1839.

[Reported 22 Pick. 559.]

TROVER. The writ contained two counts, one, for the conversion of a dwelling-house, and the other, for the conversion of the materials of a dwelling-house.

By an agreed statement of facts it appeared that Oliver G. Davenport, on the 16th of January, 1836, mortgaged to the plaintiff a lot of land in Templeton, with a dwelling-house thereon, to secure the payment of a promissory note of that date for the sum of \$450, upon which there was still due the sum of about \$270; that after such mortgage was made, Davenport, having purchased another lot of land in Templeton, undertook to remove the house to such lot; but that after having removed it from sixty to eighty rods from its former site, he took it all to pieces and carried the materials to the subsequently purchased lot, and there erected a house of the same dimensions as the former house; that in the construction of the new house, he made use of the materials of the old house, so far as they would answer the purpose, together with new materials, which were furnished by himself; that the removal of the old house and the erection of the new one, were known to the defendant; but there was no evidence that he knew of the mortgage, other than what resulted from the record thereof.

It further appeared, that when the new house was completed, Davenport, for a valuable consideration, conveyed the lot on which it stood, together with the house, to the defendant, who occupied the same from

¹ Followed in *Leonard v. Clough*, 133 N. Y. 292. But see *Strong v. Doyle*, 110 Mass. 92, *post*, p. 626.

that time until after the commencement of this action, when he sold the same to a third person.

A nonsuit or a default was to be entered, as the court should determine.

Washburn and Hartshorn, for the plaintiff.

C. Allen, for the defendant.

WILDE, J., drew up the opinion of the court. This action is submitted on an agreed statement of facts, by which it appears, that one Davenport, being the owner of a lot of land with a dwelling-house thereon, mortgaged the same to the plaintiff; that afterwards he took down the house, and with the materials partly, and partly with new materials, built a new house on another lot of his at some distance; and that after the new house was completed, he, for a valuable consideration, sold the last-mentioned lot and house to the defendant.

There are two counts in the declaration: one, for the conversion of the newly erected house; and the other, for the conversion of the materials with which it was built, belonging to the old house.

The plaintiff's counsel insist, that the old house was the property of the plaintiff, and that Davenport had no right to take it down, and could not therefore acquire any property in the materials by such a wrongful act; that the new house, being built with the materials from the old house in part, became the property of the plaintiff, although new materials were added, by right of accession; and that Davenport, having no property in the house, as against the plaintiff, could convey no title to it to the defendant.

That Davenport is responsible for taking down and removing the old house, cannot admit of a doubt; but it does not follow, that the property in the new house vested in the plaintiff.

The rules of law, by which the right of property may be acquired by accession or adjunction, were principally derived from the civil law, but have been long sanctioned by the courts of England and of this country as established principles of law.

The general rule is, that the owner of property, whether the property be movable or immovable, has the right to that which is united to it by accession or adjunction. But by the law of England as well as by the civil law, a trespasser, who wilfully takes the property of another, can acquire no right in it on the principle of accession, but the owner may reclaim it, whatever alteration of form it may have undergone, unless it be changed into a different species and be incapable of being restored to its former state; and even then the trespasser, by the civil law, could acquire no right by the accession, unless the materials had been taken away in ignorance of their being the property of another. 2 Kent's Com. 362; *Betts v. Lee*, 5 Johns. R. 348. But there are exceptions to the general rule.

It is laid down by Molloy as a settled principle of law, that if a man cuts down the trees of another, or takes timber or plank prepared for the erecting or repairing of a dwelling-house, nay, though some of them

are for shipping, and builds a ship, the property follows not the owners but the builders. Mol. de Jure Mar. lib. 2, c. 1, § 7.

Another similar exception is laid down by Chancellor Kent in his Commentaries, which is directly in point in the present case. If, he says, A. builds a house on his own land with the materials of another, the property in the land vests the property in the building by right of accession, and the owner of the land would only be obliged to answer to the owner of the materials for the value of them. 2 Kent's Com. 360, 361. This principle is fully sustained by the authorities. In Bro. tit. Property, pl. 23, it is said, that if timber be taken and made into a house, it cannot be reclaimed by the owner; for the nature of it is changed, and it has become a part of the freehold. In Moore, 20, it was held, that if a man takes trees of another and makes them into boards, still the owner may retake them, but that if a house be made with the timber it is otherwise.

In Popham, 38, this principle is further extended. The plaintiff in that case had mixed his own hay with hay of the defendant on his land, and the defendant took away the hay thus intermixed; and it was held, that he had a right so to do. But it was also held, that if the plaintiff had taken the defendant's hay and carried it to his house and there intermixed it with his own hay, the defendant could not take back his hay, but would be put to his action against the plaintiff, for taking his hay. If there be any doubt of the doctrine laid down in this case, it does not affect the present case. The doctrine laid down in the former cases is fully supported by the Year-Books, 5 Hen. 7, 16; and I am not aware of any modern decision or authority, in which this old doctrine of the English law has been controverted.

The case of *Russell v. Richards*, 1 Fairfield, 429, cited by the plaintiff's counsel, was decided on the ground, that the building in controversy was personal property and had never become a part of the freehold. In the present case it cannot be questioned, that the newly erected dwelling-house was a part of the freehold, and was the property of Davenport. The materials used in its construction ceased to be personal property, and the owner's property in them was divested as effectually as though they had been destroyed. It is clear, therefore, that the plaintiff could not maintain an action even against Davenport, for the conversion of the new house. And it is equally clear, that he cannot maintain the present action for the conversion of the materials taken from the old house. The taking down that house and using the materials in the construction of the new building, was the tortious act of Davenport, for which he alone is responsible.

*Plaintiff nonsuit.*¹

¹ See *Central Branch R. R. Co. v. Fritz*, 20 Kans. 430. *Mich. Ins. Co. v. Cronk*, 93 Mich. 49. Bac. Ab. tit. Trespass, E. 2. If a piece of timber which was illegally taken from J. S. have been hewed, this action does not lie against J. S. for retaking it. But, if a piece of timber, which was illegally taken, have been used in building or repairing, this, although it is known to be the piece which was taken, can not be retaken; the nature of the timber being changed; for by annexing it to the freehold it is become real property.

VOORHIS v. FREEMAN.

SUPREME COURT OF PENNSYLVANIA. 1841.

[Reported 2 W. & S. 116.]

ERROR to the District Court of Allegheny County.

This was an action of trover by A. L. Voorhis against John Freeman, for the conversion of one hundred and six soft and chilled rolls, which were part of the machinery of an iron-rolling mill situate in the city of Pittsburgh, and which were admitted to be of the value of \$3,863. The plaintiff claimed the property by virtue of a sheriff's sale under an execution on a judgment which he had obtained against Leonard Sample, a former owner of the mill. The defendant claimed it by virtue of a previous sheriff's sale and conveyance under a *levari facias* on a mortgage by Sample, in which the premises were described as "A lot or piece of ground with one iron-rolling mill establishment situate thereon, with the buildings, *apparatus*, steam-engine, boilers, bellows, &c., attached to the said establishment." The fact of demand and refusal as evidence of conversion, was admitted; and the questions simply were whether the rolls were real or personal property; and if the latter, whether they did not pass by the descriptive terms of the mortgage.

The court below (*Greer*, President) ruled both these points against the plaintiff, instructing the jury that the property in dispute was a part of the realty, and passed by the sale upon the mortgage.

M' Candless and *Biddle*, for plaintiff in error.

Craft and *Loomis*, for defendant in error.

The opinion of the Court was delivered by

GIBSON, C. J. It is true we ruled in an unreported case (*Chaffee v. Stewart*) that the spindles and other unattached machinery in a cotton-mill, were personal property for purpose of execution, on the authority of certain decisions to that effect, because we were indisposed to be wise above what is written; but an examination of their foundation would probably have led us to a different conclusion. It is unnecessary to pass the learning of the subject in review, as a clear bird's-eye view of it has been spread before the profession by Mr. Justice Cowen in *Walker v. Sherman*, 20 Wend. 636, from which it is evident that no distinctive principle pervades the cases universally, and that the simple criterion of physical attachment is so limited in its range, and so productive of contradiction even in regard to fixtures in dwellings to which it was adapted before England had become a manufacturing country, that it will answer for nothing else. My objection to the conclusion drawn from it in that case, is that the court adhered to the old distinction when the question related to a woollen factory, instead of following out the principle started by Mr.

Justice Weston in *Farrar v. Stackpole*, 6 Greenleaf, 157, which must, sooner or later, rule every case of the sort. The courts will be drawn to it by its liberality and fitness, while they will be drawn away from the old criterion by its narrowness and want of adaptation to the business and improvements of the age. By the mere force of habit, they have adhered to it in almost all cases after it has ceased to be a guide in any but a few; for nothing but a passive regard for old notions could have led them to treat machinery as personal property when it was palpably an integrant part of a manufactory or a mill, merely because it might be unscrewed or unstrapped, taken to pieces, and removed without injury to the building. It would be difficult to point out any sort of machinery, however complex in its structure, or by what means soever held in its place, which might not with care and trouble be taken to pieces and removed in the same way, and the greater or less facility with which it could be done, would be too vague a thing to serve for a test. It would allow the stones, hoppers, bolts, meal-chests, skreens, scales, weights, elevators, hopper-boys, and running gears of a grist-mill, as well as the hammers and bellows of a forge, and parts of many other buildings erected for manufactories, to be put into the class of personal property, when it would be palpably absurd to consider them such. If physical annexation were the criterion in regard to such things, the slightest tack or ligament ought to constitute it; else if we were to get away from it even ever so little, we should have no criterion at all. There are so many fashions, methods, and means of it, and so many degrees of connexion between material substances, that there is nothing about which men would more readily differ than whether a thing held by a band or a cleat were permanently annexed to the freehold, or only for a season; and the proof of this is seen in the results of the decisions professedly regulated by it. To avoid discrepance, it would be necessary to hold the slightest fastening to be sufficient, but to exclude from the character of real property, as well every thing constructively attached to it by the nature of the thing, as every thing held to the ground by the attraction of gravitation. Thus cleared of its exceptions, the rule of physical annexation, though at best a narrow one, might furnish a criterion of universal application, though without them, it would make havoc of the cases already decided, and indeed produce the most absurd consequences by stripping houses of their window-shutters and doors, and farms of the houses themselves. When, therefore, we reflect on the necessary exceptions to the rule, as well as the cases of constructive attachment without the semblance of a tack or ligament, we are not surprised at the confusion and embarrassment in which we are left by the decisions. The inherent imperfections of the rule required so many exceptions to it in order to avoid absurdity and injustice in its application, that it has almost ceased to be a rule at all. Being purely artificial, and having no regard to the purposes for which capital is invested, a rigid application of it would be ruinous to the manufacturer. In Pennsylvania, where a statute

directs that real estate shall not be sold on execution before the rents, issues, and profits, shall have been found by an inquest insufficient to satisfy the debt in seven years, not only might this conservative provision be evaded, but a cotton-spinner, for instance, whose capital is chiefly invested in loose machinery, might be suddenly broken up in the midst of a thriving business, by suffering a creditor to gut his mill of every thing which happened not to be spiked and riveted to the walls, and sell its bowels not only separately but piecemeal. A creditor might as well be allowed to sell the works of a clock, wheel by wheel. His interest, it may be said, would forbid him to do so; but in the case of a manufactory, he would often be compelled to sell a part, or to sell many times the worth of the debt, and none but a person entering into the business would purchase either a part or the whole. The sacrifice that would be induced by either course, is incalculable; but that is not all. The bare walls of the building would be comparatively of little value. They might perhaps answer the purposes of a barn; but so might the walls of a dwelling, when deprived of their doors and windows, and why are these considered a part of a dwelling? Simply because it would be unfit for the purposes of a dwelling without them. What, then, is demanded in the case of a building erected for a manufactory, but an application of the same principle? Whether fast or loose, therefore, all the machinery of a manufactory which is necessary to constitute it, and without which it would not be a manufactory at all, must pass for a part of the freehold. This is no more than an enlargement of the principle of constructive attachment; and it is the principle of *Farrar v. Stackpole*, glanced at by Lord Mansfield in *Lawton v. Lawton* [*Salmon*], 1 H. B. 259, note, who seems to have foreseen its day. I speak not here of questions between tenant and landlord or remainder-man, but of those between vendor and vendee, heir and executor, debtor and execution creditor; and between co-tenants of the inheritance. With this limitation, nothing said or done by this court, except its decision in *Chaffee v. Stewart*, already mentioned, and an *obiter* recognition of an adverse decision, by the judge who delivered the opinion of the court in *Gray v. Holdship*, 17 Serg. & Rawle, 415, will be found to conflict with the principle proposed. Certainly nothing else ever said by us gives countenance to the notion that the rolls of an iron-mill may be seized and sold as personal property.

But such rolls, being adapted to the manufacture of bars of different shapes and sizes, cannot all be used at once; and according to the ordinary criterion, only those in place and fixed for use would be deemed a part of the mill. But by the criterion proposed, they must be deemed equally a part of it when unfixed to give place to others; for a rolling-mill without rollers for all work, would be as incomplete as a hatter's shop without blocks for all heads. By this, however, I mean not to be understood as intimating that any such block is part of the realty. On the principle, then, that a thing temporarily severed

from the freehold does not cease to belong to it, the whole set must be considered a part of the mill. Some two or three of these rolls, however, were duplicates; but all of them had, at one time or another, been in actual operation, and it is impossible to say which were the proper members of the set, and which the supernumeraries. But even if that could be told, all might nevertheless be deemed a part of the mill, seeing that they are often broken and cannot be instantly replaced if they are not kept ready on hand. Duplicates necessary and proper for an emergency, consequently follow the realty on the principle by which duplicate keys of a banking-house, or the toll-dishes of a mill, follow it.

We are of opinion, therefore, that the rolls in question passed as a part of the freehold by the mortgage and sale on the *levari facias*; but that if they had not passed, they could not have been sold as chattels on the plaintiff's *feri facias* against the mortgagor: and were it necessary, we would further hold that they might have passed, had they been chattels, by force of the word apparatus in the description of the premises. On all these points the case is with the defendant.

*Judgment affirmed.*¹

VAUGHEN v. HALDEMAN.

SUPREME COURT OF PENNSYLVANIA. 1859.

[Reported 33 Pa. 522.]

ERROR to the Common Pleas of Lancaster County.

This was a case stated, between Joshua Vaughen and Peter Haldeman, in the nature of a special verdict, with the right to sue out a writ of error; in which the following facts were stated for the opinion of the court:—

In 1846 Peter Haldeman purchased a large brick dwelling-house and lot of ground, in Second Street, in the borough of Columbia, and moved into it and occupied it with his family until the 20th April, 1856.

In July, 1853, for the more comfortable enjoyment of the property, and lighting the premises, he caused gas-pipes to be introduced into the several apartments of the house, and ornamental and handsomely finished chandeliers, such as are commonly used in good private parlors, and brackets or side-lights attached to them. Two chandeliers were screwed into pipes in the ceiling of the parlor, and the joints were covered with cement; the brackets were screwed into the pipes in the wall and cemented, — this being the common and usual mode of fastening gas-pipes.

On the 1st of January, 1856, the premises were sold by the sheriff, under an execution against Peter Haldeman, the defendant, and were

¹ *Wadleigh v. Janvrin*, 41 N. H. 503; *Burnside v. Twitchell*, 43 N. H. 390, acc.

purchased for \$7,175 by the plaintiff, Joshua Vaughen, to whom a deed was executed on the 20th of the same month. On the 21st, notice was given to the defendant, to quit the premises, at the expiration of three months. On the 8th April, 1856, on application of the plaintiff, a writ of *estrepement* to stay waste was granted, and placed in the hands of the sheriff.

The said Peter Haldeman, while this writ was in the hands of the sheriff, and before removing from the premises, notwithstanding a notice from the plaintiff not to do so, detached the said chandeliers and brackets and carried them away.

It was agreed that if the court should be of opinion that Vaughen, the purchaser of the real estate, was legally entitled to the said chandeliers and brackets, or either of them, then judgment should be entered generally for the plaintiff, the damages to be ascertained by writ of inquiry; but if he was not entitled to them, or either of them, then judgment to be entered for the defendant; the costs to follow the judgment.

The court below (*Hayes*, P. J.) gave judgment for the defendant on the case stated; which was here assigned for error.

Stevens and *North*, for the plaintiff in error.

Fordney and *Reynolds*, for the defendant in error.

READ, J. Lamps, chandeliers, candlesticks, candelabra, sconces, and the various contrivances for lighting houses, by means of candles, oil, or other fluids, have never been considered as fixtures, and as forming a part of the freehold. There is no trace of a contrary doctrine in the English decisions, nor does it appear that the ordinary apparatus for lighting has ever been classed among fixtures.

This is still the law; but it is supposed that the introduction of carburetted hydrogen gas may have changed the character of the apparatus, because it must be connected with the pipes through which the gaseous fluid is brought into the building. If such were the case, it would establish two different rules in relation to the same subject, depending entirely upon the medium used to produce light.

The first gas-works were established in London, fifty years ago; and in 1835, the first ordinance was passed by the city of Philadelphia for their erection, since which period they have been gradually introduced into the cities, towns, and villages of the interior. The pipes connect with the street main, and are now carried up through the walls and ceilings of the house, with openings at the points where it is intended to attach fixtures, for the purpose of lighting the rooms and entries. These are called gas-fittings; whilst the chandeliers, and other substitutes for the oil-lamps and candles, are called gas-fixtures, and are screwed on to the pipes and cemented, only to prevent the escape of gas; and may be removed at pleasure, without injury either to the fittings or to the freehold. There is, therefore, really nothing to distinguish this new apparatus from the old lamps, candlesticks, and chandeliers, which have always been considered as personal chattels.

Gas-stoves are largely used for bath, and other rooms, and are necessarily connected with the gas-pipes in the same way ; but no one would think of saying that they were fixtures, which it would be waste to remove. It is, therefore, more simple to consider all these gas-fixtures, whether stoves, chandeliers, hall and entry lamps, drop-lights, or table-lamps, as governed by the same rule as the articles for which they are substituted.

We find no reported decisions on this subject in the English courts ; but there have been some cases in our sister States, bearing directly upon this question. In *Lawrence v. Kemp*, 1 Duer's Reports (Superior Court of New York), 363, it was decided that gas-fixtures, when placed by a tenant in a shop or store, although fastened to the building, are not fixtures as between landlord and tenant ; and in *Wall v. Hinds*, 4 Gray, 256, the Supreme Court of Massachusetts held that a lessee could take away gas-pipes put in by him into a house leased to him for a hotel, and passing from the cellar through the floors and partitions, and kept in place in the rooms by metal bands, though some of them passed through wooden ornaments of the ceiling, which were cut away for their removal.

The case now before us seems to have been directly decided in *Montague v. Dent*, 10 Richardson (S. Carolina Law Reports), 135, in December, 1856, by the Court of Appeals of South Carolina. Under a sale to foreclose a mortgage, a house and lot were sold, and a few days afterwards, the sheriff, under executions against the mortgagor, removed and sold certain gas-chandeliers, and pendant hall gas-burners, and the court held unanimously, that they were not fixtures which passed to the purchaser of the real estate by the conveyance of the freehold. The reasoning of the court appears to us to be decisive of the present case, the only difference being that the house here, was sold under a judgment, and not under a mortgage.

By "A supplement to an Act entitled 'An Act relating to the lien of mechanics and others upon buildings,' passed the sixteenth day of June, Anno Domini one thousand eight hundred and thirty-six," which was passed 14th April, 1855 (Pamph. L., p. 238), it is enacted "that from and after the passage of this Act, the several provisions of the Act, to which this is a supplement, be and the same are hereby extended to plumbing, gas-fitting and furnishing, and erection of grates and furnaces."

By referring to the Senate Journal of 1855, it appears that the first section of this bill was amended in the Senate, by striking out all after the word "to" in the seventh line, and inserting in lieu thereof the words as follow, viz.: "plumbing, gas-fitting, furnaces, and furnace buildings" (p. 167) ; and upon the passage of the bill, by the unanimous consent of the Senate, it was amended in the first section, by striking out of the eighth line the words "furnaces, and furnace buildings," and by inserting in lieu thereof, the words "and furnishing, and erection of grates and furnaces." Notwithstanding, therefore, the

punctuation of the Act, the word "gas-fitting" stands alone, the furnishing and erection of grates and furnaces relating to an entirely different subject.

It is not necessary to place a construction upon this Act, because in the present case the fittings and fixtures were introduced into an old house; but it would seem reasonable, that it should be confined to what is generally understood by the words "gas-fitting."

For these reasons, in addition to those assigned by the court below, the judgment must be affirmed.¹

STATE SAVINGS BANK v. KERCHEVAL.

SUPREME COURT OF MISSOURI. 1877.

[Reported 65 Mo. 682.]

THIS was a suit to enjoin defendants from removing a frame building. The petition stated that defendant Kercheval was the owner of certain lots, which he had conveyed to a trustee for plaintiff, together with all the fixtures, machinery and other articles on the lots, composing a complete flouring mill; that this conveyance was made to secure loans of money made by plaintiff to defendant, Kercheval, who had since become insolvent, leaving a large amount due plaintiff; that plaintiff had no means of collecting his debt other than this property, which was also heavily encumbered by tax liens and a prior deed of trust; that on said lots and attached to said mill there was a certain frame building, which defendants were about to tear down and remove from the lots, thus injuring the mill building and lessening the value of plaintiff's security; that defendant Allen had no right, title or interest in the lots or any of the appurtenances; that, in view of the financial condition of defendant Kercheval, and of the amount of indebtedness secured on the mill and lots and the value thereof, the damage to plaintiff would be irreparable, unless defendants were restrained from injuring the property. To this petition defendants filed separate answers.

Upon the trial it appeared that defendant Kercheval was the owner of the lots and mill, and had borrowed money and given deeds of trust on them, and that plaintiff was the holder of the notes secured by these deeds of trust. It also appeared that, after they were given,

¹ Affirmed in *Jarechi v. Philharmonic Soc.*, 79 Pa. 403. In *Natl. Bank of Catasaqua v. North*, 160 Pa. 303, 310, it was said that *Johnson v. Wiseman*, 4 Met. (Ky.) 357, is the only case *contra* in this country. In *Natl. Bank v. North*, *supra*, steam radiators were treated in the same manner. In *Capehart v. Foster*, 61 Minn. 132, the court adopted the principle of the Pennsylvania cases as to gas fixtures, but declined to follow it as to steam radiators. In *Canning v. Owen*, 22 R. I. 624, it was held that electric-light fixtures are fixtures.

defendant Allen had erected on the lots the frame building in question, to be used, in connection with the mill, as an office; that, not having been paid for the labor and material put into it, he took a bill of sale of it from defendant Kercheval, by way of payment, and was proceeding, with Kercheval's consent, to remove the building on the day when the plaintiff was about to sell under his deeds of trust; that the mill was a brick building; that the frame was separated from it by a space about three feet wide, and was only connected with it by a wooden pavement laid between the outer doors of the two buildings; that the frame was built on blocks set on the surface of the ground; that it was a temporary affair, built with the intention of being removed; that it was used as an office only, and there was never any machinery of the mill in it. It also appeared that defendant Kercheval was insolvent, but there was no evidence as to the financial condition of defendant Allen. The court decreed a perpetual injunction, and defendants appealed.

E. O. Hill, for appellants.

B. Pike and *H. K. White*, for respondent.

HENRY, J. The questions for consideration here are:

1st. Was the building which it is alleged the defendants were about to remove, personal property?

2nd. If not, would an action for damages have afforded an adequate remedy?

It must be admitted that the law in regard to fixtures is in a somewhat chaotic state. It is frequently difficult to determine, upon principle, whether an article of property is a fixture or not. There is a most embarrassing conflict in the adjudged cases. On grounds of public policy, to encourage trade, manufactures and agriculture, many things are regarded as chattels in controversies between landlords and tenants, which would unquestionably be held as fixtures, as between vendor and vendee; and the same rule prevails between mortgagor and mortgagee, as between grantor and grantee. In determining whether a building is part of and passes with the land, a good deal depends upon the object of its erection, the use for which it was designed. The intention of the party making the improvement, ultimately to remove it from the premises, will not, by any means, be a controlling fact. One may erect a brick or a stone house, with an intention, after brief occupancy, to tear it down and build another on the same spot, but that intention would not make the building a chattel. "The destination which gives a movable object an immovable character, results from facts and circumstances determined by the law itself, and could neither be established nor taken away by the simple declaration of the proprietor, whether oral or written." *Snedeker v. Warring*, 2 Kernan, 178. In *Goff v. O'Conner*, 16 Ill. 422, the court said: "Houses in common intendment of the law, are not fixtures, but part of the land. . . . This does not depend, in the case of houses, so much upon the particular mode of attaching, or fixing and

connecting them with the land, upon which they stand or rest, as upon the uses and purposes for which they were erected and designed." In *Cole v. Stewart*, 11 Cush. 182, the building was intended by the owner to be temporary, and was built with a view to ultimate removal. In a contest between the mortgagee, whose mortgage was executed subsequent to the erection of the house, and a purchaser of the building from the mortgagor, it was held to be a fixture. In the light of these cases, and many others which we have examined, we do not regard the fact, that the building in question, was erected as a temporary building, and with an intention of ultimate removal, at all decisive as to whether it became a part of the realty or not.

The manner in which a building is placed upon land, whether upon wooden posts, or a rock, or brick foundation, does not determine its character. As was said by Parker, J., in *Snedeker v. Warring*, above cited: "A thing may be as firmly fixed to the land by gravitation as by clamps or cement. Its character may depend upon the object of its erection." In *Teaff v. Hewett*, 1 Ohio St. 511, it was held that: "The intention of the party making the annexation to make the article a permanent accession to the freehold, this intention to be inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation and the purpose and use for which the annexation has been made," is a controlling circumstance in determining whether the structure is to be regarded as a fixture or not. In the case of *Benjamin F. Butler, Adm. v. Page*, 7 Met. 42, Shaw, C. J., delivering the opinion of the court, said: "All buildings erected and fixtures placed on mortgaged premises by the mortgagor, must be regarded as permanently annexed to the freehold. They go to enhance the value of the estate, and will therefore enure to the benefit of the mortgagee so far as they increase his security for his debt, and to the same extent they enhance the value of the equity of redemption, and thereby enure to the benefit of the mortgagor." In controversies between mortgagor and mortgagee the rule is more favorable to the mortgagee in relation to fixtures than that which is applied as between landlord and tenant, and, applying the principles announced in the cases which we have cited, which we believe to be sound and salutary, we must hold that the building in question was a part of the realty, and that neither the mortgagor, nor the purchaser from him has a right to remove it. It becomes a part of the plaintiff's security for its debt.

The remaining question is, did the facts alleged in the petition warrant the court in restraining the parties by injunction from removing the building. It is not essential that the injury threatened shall be irreparable, to warrant a resort to the remedy by injunction. Our statute provides, sec. 24, page 1,032, Wag. Stat., that "the remedy by writ of injunction shall exist in all cases, when an injury to real or personal property is threatened, and to prevent the doing of any legal wrong whatever, whenever, in the opinion of the court, an adequate

remedy cannot be afforded by an action for damages." Would an action for damages here have afforded an adequate remedy, is the question, and not whether the threatened injury would have been irreparable. The building was erected to be used in connection with, and as an office, for the mill. It was erected to supply the place of an office formerly used, which had been appropriated to another purpose. Its immediate and constant use was of importance to the milling business. The value of the building which a jury might have given as damages would not have been a sufficient compensation to the owner for its removal. The defendant Allen may have been solvent, amply able to respond in damages for his trespass, but it does not therefore follow that he could not be restrained from severing from the land a house which belonged, not to him, but to the owner of the land. If a man of large fortune, so wealthy as to place beyond a doubt his ability to pay any damages which might be assessed to me for his trespass, should determine and threaten to tear down my dwelling over my head, will it be said that a court of equity would be powerless to restrain him from executing his threats, and that I would have no remedy but to suffer the wrong and sue for damages? There are inconveniences and perplexities to which one may be subjected by a trespass such as we are considering, for which a jury could not, under the rules of law, fully compensate him, and we think the provision of our statute broad enough, however the law may have been before its enactment, to authorize a resort to injunction proceedings in such cases. The judgment of the circuit court is affirmed. All concur.

Affirmed.

CARPENTER v. WALKER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1886.

[*Reported 140 Mass. 416.*]

BILL in equity, filed February 11, 1884, in the Superior Court, against Otis Walker, Thomas E. Rich, and Paris Rich, alleging that the two last-named defendants, on June 19, 1883, executed a mortgage of certain chattels to the plaintiff; namely, a boiler and steam-engine and certain machinery, to secure their promissory note for \$1000, payable to the plaintiff or order, on demand; and that the defendant Walker had possession of the building in which said chattels were, and refused to deliver them to the plaintiff, or to allow him to take possession of them for the purpose of foreclosing his mortgage.

The prayer of the bill was, that Walker be restrained from preventing the plaintiff from taking possession of said chattels, and from moving, concealing, and disposing of the same; and for further relief.

The defendant Walker filed an answer, alleging title to the property

by virtue of a mortgage, executed to him by the two last-named defendants on June 20, 1881, which conveyed a certain parcel of land with the buildings thereon. The answer also alleged that all the articles mentioned in the bill, except the boiler and engine, were in the building at the time the mortgage to Walker was made; that the boiler and engine were subsequently placed therein; and that all of the articles were fixtures.

The case was referred to a master, who found the following facts:

The engine, boiler, and machinery were used in a mill or factory building standing on the land mortgaged to Walker, and were used in carrying on the business of making sashes and blinds.

The boiler and engine were cast together, the engine being on top of the boiler. Their united weight was fifty-six hundred pounds. Two iron legs projected from the rear end of the boiler and stood on timbers. There were also two small projections, one on each side of the boiler near its front end, but the front end rested on bricks, which were built up to form the ash-box and placed around and laid to prevent fire. A shed was built over the engine-house and boiler, the grist-mill building and the sash and blind building constituting one end and side of said shed. There was no doorway into this shed except an opening from the sash and blind mill, and the boiler and engine could not be removed except by removing the shed or by taking off some boards to enlarge the opening into the factory. The shed was built over the boiler and engine to protect them from the weather. The boiler and engine were not fastened to the building, nor to the land, except that the engine was belted to the main shaft, but they were kept in place by their own weight. They were called "Allen's Portable Boiler and Engine." I find the boiler, engine, and attachments to be portable, and that they retained the character of chattels.

There were ten or more machines described in the plaintiff's bill, all of which were used in the factory to make sashes and blinds, as follows:—

1. A jointing-machine, with circular saw and track: fastened at the bottom by cleats about the legs, which were nailed to the floor; and the feet of the machine were nailed to the floor.

2. A tongue-groover or matching-machine: wood, fastened with cleats and feet nails, and had not been moved since it was set up.

3. A planing-machine: cast-iron, screwed to the floor with Colt screws: this had not been moved since it was set up.

4. A circular saw and table: wooden frame, fastened by cleats and nails.

5. A heavy machine called a slat-planer: wood, with iron legs made to be bolted down to the floor.

6. A sticker: fastened to the floor by Colt screws, which are turned by a wrench.

7. A cut-off saw and table: wood frame, fastened by cleats and nails to the floor.

8. A slat-machine for tenoning : iron frame, screwed to the floor.
9. Boring-machine : wooden frame, held mainly by cleats.
10. Mortising-machine: iron, fastened by four screws to floor, steadied on top by braces nailed to ceiling.
11. Sand-paper machine: cleats round the bottom, and fastened to the floor above.

The said machinery was all connected with the shafting, directly or indirectly, by pulleys or gearing, and was run by belts. The machines stood over the shafting, which was under the floor and in a position convenient to be run by said shafting. None of the machines was very heavy. They were movable, and were sometimes, though not often, moved. They were adapted to do the work carried on in the mill, but could be used elsewhere in the same business.

The master found all of said machines to be personal property, and to be included in the plaintiff's mortgage, but not in the defendant Walker's; and all the shafting to be part of the realty, and to belong to said defendant.

Walker filed the following exceptions to the report :

"In that, upon the findings of fact as to the boiler and engine, the master has erred in his findings of law, that a boiler and engine, placed as this boiler and engine were placed, and resting upon a brick foundation as did this boiler, and used for conveying power to this sash and blind shop, were chattels, instead of real property included in and subject to the defendant's mortgage.

"In that, upon the findings of fact as to the machinery named from paragraphs 1 to 11, fastened to the building in the manner set forth in said report, and used for carrying on the business of manufacturing sashes and blinds in the building upon the land described in the defendant's mortgage, which building was built for that purpose, the master has erred in his finding of law, that such machinery is a chattel, instead of real property included in and subject to the defendant's mortgage."

Pitman, J., overruled the exceptions, and ordered a decree for the plaintiff; and the defendant Walker appealed to this court.

J. M. Cochran, for the defendant Walker.

A. J. Bartholomew, for the plaintiff.

HOLMES, J. Perhaps it would have saved perplexing questions, if, as between vendor and purchaser, or mortgagor and mortgagee, the rule of the common law had been adhered to more strictly, that whatever is annexed to the freehold by the owner becomes a part of the realty, and will pass by a conveyance of it. *Y. B. 21 Hen. VII. 26*, pl. 4; *Elwes v. Maw*, 3 East, 38; s. c. 2 Smith Lead. Cas. (8th Am. ed.) 191; *Fisher v. Dixon*, 12 Cl. & Fin. 312, 328, & seq.; *Mather v. Fraser*, 2 K. & J. 536; *Walmsley v. Milne*, 7 C. B. (N. S.) 115; *Gibson v. Hammersmith Railway*, 32 L. J. Ch. 337, 340; *Climie v. Wood*, L. R. 4 Ex. 328; *Holland v. Hodgson*, L. R. 7 C. P. 328; *Meux v. Jacobs*, L. R. 7 H. L. 481, 490. The right of a tenant to sever chat-

tels which he has attached to the realty might be admitted, and yet the property might be regarded as land until severed, as it seems to be in England. The language of *Hellawell v. Eastwood*, 6 Exch. 295, which looked the other way, has been criticised in the later cases, some of which we have cited.

But the later decisions of this Commonwealth establish that machines may remain chattels for all purposes, even though physically attached to the freehold by the owner, if the mode of attachment indicates that it is merely to steady them for their more convenient use, and not to make them an adjunct of the building or soil. *McConnell v. Blood*, 123 Mass. 47; *Hubbell v. East Cambridge Savings Bank*, 132 Mass. 447; *Maguire v. Park*, 140 Mass. 21.

It is more important to respect decisions upon a question of property than to preserve a simple test; and, for this reason, the decree of the Superior Court must be affirmed. The master reports that he finds the articles in controversy to be personal property, and we cannot go behind this finding, unless the facts found specially require a different conclusion, as matter of law. The special facts are, that the boiler and engine were portable, and not attached to the realty, except that they were belted to the main shaft; but that they could not be removed except by removing a shed built over them to protect them from the weather, or by taking off some boards to enlarge the opening into the factory. The machines were fastened to the floor by cleats, screws, or nails. We cannot say, as matter of law, that these facts are inconsistent with the master's finding, in view of the cases cited. We must take that finding to exclude the articles having been put where they were as a permanent improvement to the building, whatever conjecture we might have formed but for the master's general conclusion.

*Decree affirmed.*¹

FEDER v. VAN WINKLE.

COURT OF ERRORS OF NEW JERSEY. 1895.

[Reported 53 N. J. Eq. 370.]

ON appeal and cross-appeal from a decree of the chancellor, dated February 11th, 1895, in *Brown v. Riverside Bridge and Iron Works*, an insolvent corporation, on the application of the receiver of said corporation.

Mr. John W. Griggs, for Feder.

Mr. Eugene Stevenson, for the receiver.

The opinion of the court was delivered by

VAN SYCKEL, J. The controversy in this case is between the appellant, who has a real estate mortgage, and John A. Van Winkle,

¹ *Hopewell Mills v. Taunton Savings Bank*, 150 Mass. 519.

receiver of the Riverside Bridge and Iron Works, an insolvent corporation, and relates to certain machinery which was used in its business of manufacturing structural and bridge iron. The said company had been engaged for fourteen or fifteen years in carrying on its business prior to its insolvency.

It occupied a tract of about two acres of land, on which the buildings in which the business was carried on were erected.

The buildings were —

1. The main shop, sixty by one hundred and sixty feet. It was a mere shed, having no floor except the natural earth.

2. The office building.

3. The blacksmith shop, which also had no floor.

4. The storehouse.

5. The foundry, which had no floor.

6. The machine shop, which was part of the main shop and had a wooden floor.

7. The templet shop on the second floor over a part of the main shop.

8. The engine-room, from which power was supplied to the different machines.

All the buildings were frame, and were practically joined together as one enclosure, the pipes, shafting and other appliances running from one into the other. The appellant held a mortgage, given May 15th, 1889, which covered the real estate by its description, and also contained the following clause:—

“Also all steam engines, boilers, shafting, belting, pulleys, hoisting apparatus and all other machinery whatsoever, with all connections, fixtures and appurtenances thereto belonging upon said premises or in the buildings erected thereon or any of them.”

This mortgage was duly recorded as a real estate mortgage on the day it bears date.

In order to establish the claim of the mortgagee to the machinery as against the receiver, it must appear:—

First. That the chattels were actually annexed to the real estate or something appurtenant thereto.

Second. That they were applied to the use or purpose to which that part of the realty with which they were connected was appropriated.

Third. That they were annexed with the intention to make a permanent accession to the freehold.

This case must be adjudged by the law as propounded in the following cases in this court: *Blanche v. Rogers*, 11 C. E. Gr. 563; *Penn Insurance Co. v. Semple*, 11 Stew. Eq. 575; *Speiden v. Parker*, 1 Dick. Ch. Rep. 292.

The difficulty arises in applying the rule; each case must be determined according to its particular facts and circumstances.

The chattels must, to constitute them fixtures, be actually annexed to the real estate or something appurtenant thereto.

They need not necessarily be attached to the building; that is one way of annexing them to the soil, but not the only way.

A steam engine set upon a brick foundation laid in the earth without any attachment to the building is unquestionably a fixture.

In *Speiden v. Parker, supra*, a derrick set in the ground to hoist stone, and a track laid on ties in the ground on which cars were run, were held to be fixtures.

So that to satisfy this test, it is not material whether the substructure is brick or wood, or whether the machinery is annexed to the building, or rests upon a foundation securely laid for it in the soil, and to which it is fastened.

Neither is the fact that the things in question may be removed and sold for other uses, or that they were not made for special adaptation to the buildings in which they are placed, decisive of their character. Those qualities are mere circumstances to be considered, but the presence of them does not necessarily withdraw machinery from the real estate mortgage. A steam engine, to take on the qualities of a fixture, need not be made specially for the building in which it is planted. It may, like any other piece of mechanism, be removed and used with equal advantage in any other establishment for which it will furnish sufficient power.

The same observation will apply to other articles which, in the court below, were properly adjudged, in accordance with almost all cases on this subject, to be fixtures.

There must be actual annexation with an intention to make a permanent accession to the freehold, but it is not necessary that there be an intention to make the annexation perpetual. A test so severe would be impracticable in its application.

The intention must exist to incorporate the chattels with the real estate for the uses to which the real estate is appropriated, and there must be the presence of such facts and circumstances as do not lead to but repel the inference that it is intended to be a temporary annexation.

In *Blancke v. Rogers* two machines were the subject of controversy — a “number one, four-sided, inside moulding machine” and a “number one clipper, planer and matcher.”

The opinion says that no adjustment was made of them to fit, in anywise, to the place where they were put for use. They were placed in the building, upon the floor of a room, without support. One was not attached in any way to the soil or building; the other was partially bolted to the floor with screw-bolts. They were movable in the building and were moved about at the convenience of the owner, and run from different parts of the shafting. *Blancke v. Rogers*, 11 C. E. Gr. 565, 568.

The learned justice who delivered the opinion of the court was clearly right in saying that, while such chattels may be so annexed to and incorporated into the realty as to become, through the manner of annexation and the purpose of the owner, a part of the freehold, yet there was an absence in that case of evidence to show such annexation and intention.

In *Penn Insurance Co. v. Semple* the machines were fastened to the

floor by small screws, to steady them, and in their use some were moved from one place in the building to another.

This court said: "There was no evidence in any act of the owners, or in any circumstance growing out of the organization or manner of conducting the manufacturing establishment, showing a design on the part of the owners to make a permanent addition of the property in dispute to the realty."

The later case of *Speiden v. Parker* was a controversy respecting the character of certain appliances used in connection with a stone quarry and dock in Essex county.

They consisted of three boilers, two engines, two hoisting gears, three derricks and a steam-pump, with connecting pipes, valves and pulleys, all located in or near the quarry, and a railroad track laid from the quarry to the dock on Passaic river, to transport stone, and two derricks at the dock, to transport the stone to boats.

The stationary machinery was fastened in the ground and was used for the only purposes to which the real estate was put. Upon these facts this court rested its conclusion that these appliances were attached to the freehold with the intention of making them part thereof. The opinion of this court was unanimous and was concurred in by Mr. Justice Knapp, who delivered the opinion of the court in the two cases last cited.

Not one of the implements involved appeared to have been specially adapted to the place in which it was used — some were set in the earth — and all could have been removed and applied to the prosecution of a like business elsewhere.

The decision must rest upon the facts that the appliances were actually annexed; that they were adapted to and used in the business for which the realty was held by the owner; that a common purpose was to be promoted by attaching the chattels to the freehold; that the just inference was that the annexation was intended to continue so long as the business was prosecuted on those premises, and that the enterprise was intended to be permanent in the sense in which that term is used in business transactions — permanent as contradistinguished from temporary.

It will be necessary, therefore, to look at the controlling facts of this case before us to determine whether there was an absence of intention to incorporate the machinery with the real estate, as in the *Blanke Case*, or the presence of such intention, as in the *Speiden Case*.

The following is a brief statement of the machines included in the petition of appeal, and the manner of their annexation: —

Numbers 1, 2, 4, 5, 8, 10, 12, 13, 20, 21, 25, 26 and 52 are heavy machines, most of them weighing from two thousand pounds to six thousand pounds. They rest upon large timbers laid in the earth to their full depth, and they are fastened to them by bolts running down through the timbers.

Numbers 49, 50 and 51, in addition to the heavy timbers to which

they are fastened at the base, are also fastened down into a subfoundation of concrete, and for them the building was adapted by cutting holes, and running pipes from the boilers in the boiler-house, one hundred feet away.

Numbers 15, 16, 17 and 30 are fastened to columns of the shop by bolts, and other fastenings in some cases.

Numbers 5, 14 and 46 are fastened by iron or wooden rods, or both, let down from the beams or rafters above.

Numbers 28, 29, 40, 41, 42 and 45 are fastened to the floor by lag screws, which are heavy bolts with a screw. The lightest in weight is four hundred pounds, and the heaviest is eight thousand pounds.

Numbers 1 and 2 have power applied by a belt coming through a hole in the roof.

Numbers 45 and 46 were adapted for use by the adjustment of timbers and braces in the building, and the cutting of holes through the floor for running the belt.

In view of these facts, I am of the opinion that these chattels did not retain the character of personalty, as in the *Blanche Case*, but were transmuted into realty, and passed to the mortgagee as in the *Speiden Case*. In no respect was that case stronger for the mortgagee than is this. If all the tests necessary to constitute the chattels fixtures were satisfied in that case, they surely are in this case.

The various appliances were actually annexed to the freehold. They were fitted for and applied to the use to which the real estate was appropriated, all being designed for and necessary to the prosecution of a common purpose. Thus the machinery and land became unified and incorporated together as a whole.

The business had been carried on for fourteen years, and save for business disaster might, and probably would, have been prosecuted indefinitely. The machinery employed, the mode of its annexation and manner of its use, in connection with the realty as an entirety, indicated not a temporary but a permanent accession.

The fact that the machines might be removed and utilized elsewhere will not, under the circumstances of this case, serve to sever them in legal contemplation from the freehold.

The decree below should be reversed as to all the articles above specified, and a decree rendered in accordance with the views herein expressed.¹

¹ "As far as I have looked into [the cases], and I have examined a good many, both English and American, they are almost uniformly hostile to the idea of mere loose moveable machinery, even where it is the main agent or principal thing in prosecuting the business to which a freehold property is adapted, being considered as a part of that freehold for any purpose. To make it a fixture, it must not only be essential to the business of the erection, but it must be *attached to it* in some way; at least, it must be mechanically fitted, so as, in ordinary understanding, to make a part of the building itself.

"The cases of constructive annexation, where the article is seldom or never corporally attached to the realty, are few, and may be set down as exceptions to the

B. *Annexation to Other's Land.*

LANCASTER v. EVE.

COMMON PLEAS. 1859.

'[Reported 5 C. B. (N. S.) 717.]

THIS was an action for an injury done to a pile, the property of the plaintiff, in the river Thames.

The cause was tried¹ before CROWDER, J., at the sittings in London after last Trinity Term, when the following facts appeared in evidence: The plaintiffs were possessed of a wharf on the Surrey side of the river Thames, opposite to which, about fifty yards from the shore, was a pile firmly driven about eight feet into the bed of the river. It did

general rule. They are said to be the charters or deeds of an estate and the chest containing them, deer in a park, fish in a pond, and doves in a dove house. 2 Com. Dig. Biens, B. 6 Greenl. 157. 3 Dane's Abr. 156. 3 New Hamp. R. 505. The deer, fish and doves are set down by Amos & Fer. on Fixt. 168, as *heir looms*; and so of various other animals. *Heir looms* are a class of property distinct from *fixtures*. But "the doors, windows, locks, keys and rings of a house will pass as fixtures, by a conveyance of the freehold, although they may be distinct things; because they are constructively annexed to the house." Amos & Fer. on Fixt. 183, and the books there cited. Many other obvious cases may be supposed. One is, our ordinary Virginia fence on country farms. No vendor would consider that as mere personal property. And in *Kittredge v. Woods*, 3 N. Hamp. R. 503, it was held that manure lying about a barn yard passed by a conveyance of the land as an incident.

"These instances seem fully to justify the courts when they speak of the great difficulty in fixing on any certain criterion which shall govern all cases. They lead to a strain of reasoning by Mr. Dana, in the 8d vol. of his Abridgment, p. 156, as well by Weston, J. in *Farrar v. Stackpole*, by which, if followed out in practice, the machinery now in question might well be considered as a part of the realty; and therefore, the subject of partition. Mr. Dana says, that in all the instances put by him, the articles 'are very properly a part of the real estate and inheritance, and pass with it, because not the mere fixing or fastening to it is alone to be regarded; but the use, nature and intention.'

"The ancient distinction, however, between actual annexation and total disconnection is the most certain and practical; and should therefore be maintained, except where plain authority or usage has created exceptions. The reasoning of Mr. Dana, and of the learned judge in *Farrar v. Stackpole*, before cited, while it cannot be too extensively applied to modern machinery in subordination to that distinction, does not appear to be sustained by authority, when it seeks to raise a general doctrine of constructive fixtures, from the moral adaptation of what is in fact a mere moveable, to the carrying on a farm or factory, &c. however essential the moveable may be for such purpose. The argument in that shape proves too much. Such adaptation and necessity might be extended even to the use of domestic animals on a farm, and certainly to many implements in a manufactory which could never be recognized as fixtures, without utterly confounding the rule by which the rights of the *heir* or the *purchaser* have been long governed." COWEN, J., in *Walker v. Sherman*, 20 Wend. 636, 639, 646, 658.

As to the rolling-stock of a railroad, see *Williamson v. New Jersey Southern R. R. Co.*, 29 N. J. Eq. 311.

¹ The pleadings are omitted. — ED.

not appear by whom the pile was originally so fixed : but it was proved, that, about twenty years ago, the then occupiers of the plaintiffs' wharf had either repaired it or renewed it, and that it was exclusively used by the occupiers of the wharf, and was necessary to the enjoyment of the wharf in the mooring and navigating of craft into the wharf for the purpose of loading and unloading, and that nobody had ever interfered with it. It was also proved that there were many other such piles on both sides of the river, which were used by other persons for similar purposes. The defendants' servants, in navigating their barge, negligently ran against and carried away the pile ; and this was the injury complained of.

On the part of the defendants, it was submitted that the case came within the maxim "*Quicquid plantatur solo solo cedit*," and therefore that the plaintiffs or their predecessors had, by permanently fixing the pile to the soil of the river, abandoned all property in it, if ever they had any, to the owners of the soil, and consequently that the defendants were entitled to a verdict on not possessed.

For the plaintiffs it was insisted that there was ample evidence to warrant the jury in inferring that the pile was placed in its present position with the consent of the Crown or the conservators of the river, for the more convenient use by the plaintiffs of their wharf, and so remained their property.

The learned judge, who was not required by either side to leave anything to the jury, reserving the point of law, directed a verdict to be entered for the plaintiffs for the value of the pile.

Dowdeswell, in Michaelmas Term last, moved to enter a verdict for the defendants upon not possessed, or a nonsuit, or for a new trial.

Lush, Q. C., and *T. Salter*, now showed cause.

Pigott, Sergt., and *Dowdeswell*, *contra*.

COCKBURN, C. J. I am of opinion that this rule should be discharged. Of course I do not mean to controvert or question the general proposition, that, whatever is annexed to the freehold becomes part of the freehold. But there may be circumstances to take a case out of the general rule, as, for instance, where the thing is so annexed as to be severable without injury to the soil, and where there may have been an agreement between the owners of the soil and the owner of the chattel, that the chattel should be severable at the will and pleasure of the latter. I think there are circumstances here from which we may properly draw the inference that the pile in question was not placed in the bed of the river with a view to its permanent annexation to the freehold so as to become part of the freehold ; but that it was placed there by virtue of an easement granted by the Crown or whoever had the right to grant it, to the occupiers of the adjoining wharf, for the more convenient use and enjoyment thereof. It seems to have been admitted at the trial that the plaintiffs or their predecessors in the enjoyment of the wharf had fixed the pile where it stood, and had had the use and benefit of it for a long series of years without there ever having been

any interruption or any assertion of right to it by the Crown or by the conservators of the river. The fair inference, therefore, is, that the pile was driven into the bed of the river in the exercise and enjoyment of a right or easement, and that it never was intended that the Crown or any other body or person should acquire any right or property in it, but that it should continue the property of the occupiers of the wharf, with the right to remove it at their pleasure. I therefore think the plaintiffs' claim in this action is not impeded by the plea of not possessed.

WILLIAMS, J. I am entirely of the same opinion. No doubt the maxim "*Quicquid plantatur solo solo cedit*" is well established: the only question is, what is meant by it. It is clear that the mere putting a chattel into the soil by another cannot alter the ownership of the chattel. To apply the maxim, there must be such a fixing to the soil as reasonably to lead to the inference that it was intended to be incorporated with the soil. The evidence showed that these piles were essential to the beneficial navigation of the river by persons passing up and down to the several wharves. I am not aware that there is anything contrary to law in those who possess wharves on the banks of the Thames driving piles or stakes into the bed of the river adjacent thereto, for the more convenient enjoyment of their right to navigate and use the river. It is unnecessary, however, to consider that. I entirely agree with the Lord Chief Justice in thinking that there was abundant evidence here to warrant the conclusion that the pile in question was planted in the soil of the river by the plaintiffs' predecessors, — though at what time did not distinctly appear, — with the consent of the Crown or the conservators of the river, not for the benefit of the soil, but in order to the more commodious enjoyment of the advantages of the wharf; and that it was so placed, not upon the terms that it should be considered as annexed to or incorporated with the soil, but for the purposes of navigation. That necessarily involves the conclusion that the owners of the pile are not bound to keep it there altogether, but that they may remove it at their free will and pleasure. The case falls within the principle of *Wood v. Hewett*, 8 Q. B. 913 (E. C. L. R. vol. 55). The circumstances clearly show that this pile, like the fender there, was placed in the soil of the river, not for the purpose of incorporating it therewith, but for the more convenient use of the plaintiffs' wharf. I therefore think the plaintiffs are entitled, as in common justice they ought to be, to maintain an action and to recover damages for an interference with that which is indispensable to the enjoyment of their wharf.

CROWDER, J. There was ample evidence to show that the pile was placed in the bed of the river for the purpose of the more convenient enjoyment of the plaintiffs' wharf, — for mooring and assisting barges coming to and going from the wharf for the purpose of loading and unloading. It appeared that more than twenty years ago there had been a pile there which had become decayed, and the pile in question had

been substituted for it by the plaintiffs or the former tenants of the wharf. The point taken at the trial, was, that, by whomsoever placed there, the fact of its being permanently fixed to the soil caused it to become the property of the owners of the soil, and to cease to be the property of the plaintiffs. I reserved the point: and I must own that I entertained considerable doubt upon it. I now, however, entirely agree with the Lord Chief Justice and my Brother Williams in thinking that it is by no means a necessary consequence of the pile's being fixed to the soil of the river, that it ceased to be property of the plaintiffs, and thereby became the property of the owners of the soil. There was evidence that numerous piles were placed up and down the river for the same purposes. There was, therefore, ample ground for inferring that there was an easement to place this pile in the river for the use and convenience of access to the plaintiffs' wharf. The plaintiffs, therefore, did not lose their property in it by placing it in the soil, inasmuch as it was placed there for their own purposes, and not for the purpose or with the intention of making it part of the soil.

WILLES, J., concurred.

*Rule discharged.*¹

WASHBURN v. SPROAT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1820.

[Reported 16 Mass. 449.]

LEONARD SPROAT, the respondent's intestate (whose estate was deeply insolvent), in his lifetime erected a dwelling-house and a joiner's shop on certain land, the fee of which was then, and at the time of his decease, in his wife. On the final settlement of the respondent's administration account in the probate office, the appellants, being creditors to the estate of the intestate, insisted that he should be held to account for the value of those buildings. The judge of probate, being of opinion that the said buildings were not liable to the debts of the deceased, decreed accordingly; and the appellants, dissatisfied with the said decree, appealed to this Court.

Wood, for the appellants, referred to the case of *Wells et al. v. Banister et al. & Trustee*, 4 Mass. 514.

Eddy, for the respondent.

Per Curiam. The administrator cannot be held to account for the value of buildings erected upon land belonging to the wife of his intestate. There could be no contract with the wife during her coverture, which would entitle the administrator to enter upon the land, and take the buildings. In the case of a lease, the tenant may remove buildings, erected on the demised premises in such a manner that they may

¹ And see *Moody v. Steggles*, 12 Ch. D. 261. As to the right of a railroad company to remove stone piers, etc., see *Wagner v. Cleveland, etc., R. R. Co.*, 22 Ohio St. 563.

be removed without injury to the soil. But if one erect buildings upon the land of another voluntarily, and without any contract, he may not remove them. *Decree affirmed.*¹

SMITH v. BENSON.

SUPREME COURT OF NEW YORK. 1841.

[*Reported 1 Hill, 176.*]

TROVER, for a building used as a grocery and dwelling house. The cause was tried at the Onondaga circuit, April 11, 1839, before Moseley, C. J. The plaintiffs' title was derived under a mortgage dated September 20, 1837, from one Ladd, in which the building was described as situated on a lot belonging to the estate of I. Brackett and T. M. Wood, deceased; and was treated in the mortgage as a chattel. The mortgage was in the usual form of instruments of that nature relating to personal property, being a sale, defeasible on payment. It provided that in case of default, &c. the mortgagees might enter, &c. and take and carry away, &c. and sell, &c.

The testimony as to the character of the building, and its connection with the premises on which it stood, showed, that it was set upon blocks or pins drove in the ground, and, as one witness said, was elevated above the surface, and did not rest on the ground or on stones. Other witnesses testified to their belief that it rested on the ground, and said that there was a cellar under it; that a plank in the cellar standing end wise, had started the floor up; that the sills on the east side had settled into the ground; that the linter part in the rear rested on the ground; that there was a chimney in it, &c.

Ladd was in possession of the building when he gave the mortgage to the plaintiffs, occupying it as a grocery; and it had also been occupied as a dwelling.

The building was erected by one Brown, in 1828, who rented the ground on which it stood, of Brackett and Wood, with the understanding that he was to have three or six months' notice to remove the building. The possession of the building had changed, passing from Wood down through Ladd to the present defendants.

The defendants purchased the building of Ladd, subject to the mortgage, the amount due on which was deducted from the purchase money; and the defendants had recognized the plaintiffs' title in September, 1838.

The defendants gave in evidence a lease of the ground upon which the building stood, to Benson, one of the defendants, and R. Lee, for the term of two years from January 9, 1838.

On the 10th of December, 1838, default having been made in respect

¹ See *First Parish in Sudbury v. Jones*, 8 Cush. 184, 189. — ED.

to paying the moneys secured by the mortgage, and the defendants being in possession of the building, G. Lawrence as agent of the plaintiffs demanded possession from the defendants, who refused to surrender it.

The judge charged the jury that if they believed the building could be removed without injury to the freehold, and that it was built with a view to its being removed when the landlord required it, it was a chattel, and trover might be maintained for it. That, both parties claiming under Ladd, the defendants could not question the plaintiffs' title.

The verdict being for the plaintiffs, the defendants now move for a new trial on a case.

J. A. Spencer, for the defendants.

E. A. Brown, for the plaintiffs.

By the Court, COWEN, J. The judge was clearly right with regard to the title of the plaintiffs; and the only question calling for consideration is, whether the building was a fixture in that sense which precludes the right to bring trover for it.

The building was slightly fixed to the freehold; and all parties — the owners of the lot on which it was built — the builder himself — Ladd the mortgagor who succeeded him and the plaintiffs, the mortgagees — regarded it as the subject of removal at any time; and when the mortgage came to be given by Ladd to the plaintiff, they treated it as a mere movable thing, on a footing with other personal property. The defendants themselves took from Ladd; they stand in his shoes, and the case is the same as is if they had given the mortgage themselves. Thus, both these parties agreed to consider it as in a state of severance from the freehold; and no one had ever thought of its being so fixed as to be irremovable. *Prima facie*, such a building would be a fixture, and would not be removable. The legal effect of putting it on another's land, would be to make it a part of the freehold. But the parties concerned may control the legal effect of any transaction between them, by an express agreement. They have, in effect, stipulated, that the placing of this building on the ground of Brackett and Wood, should work nothing more towards changing its nature than if it had been the loose timber of the house, instead of the house itself. The law often implies an agreement of nearly the same character from the relation of lessor and lessee, or tenant and remainderman. And, surely, the parties may, by express agreement, do the same thing, and even more. If they agree, in terms, that a dwelling house shall, as between them, be considered strictly a personal chattel, it takes that character. And so of any equivalent agreement or understanding, which we think existed in this case between all the parties concerned.

The learned judge was right at the circuit; and the motion for a new trial should be denied.

New trial denied.

STILLMAN v. HAMER.

COURT OF ERRORS OF MISSISSIPPI. 1843.

[Reported 8 Miss. (7 Howard) 421.]

IN error from the Circuit Court of the county of Yazoo.

Miles, Corwine, & Wm. Yerger, for plaintiff in error.

G. S. & J. S. Yerger, contra.

Mr. Justice CLAYTON delivered the opinion of the court.

This was an action of trover, brought by the plaintiffs in error against the defendant, to recover the value of a house which had been moved from one lot in Yazoo city to another. The defendant, Hamer, originally owned a number of lots in that place jointly with one Caldwell, who in November, 1832, conveyed his undivided interest to William L. Richards, and the plaintiffs are the heirs at law of Richards. In the year 1834, the plaintiffs, as the heirs at law of Richards, obtained an order for the partition of the lots thus owned between them and Hamer, in the chancery court; and from the recitals contained in a deed which was read in evidence, it appears that a division was made, and that a decree of the court was rendered at its May term, 1835, appointing a commissioner to make conveyances to the parties entitled. From the recitals in the same deed it appears that a conveyance was executed by the commissioner on the 6th of May, 1835, which was never recorded, and which was lost, and that the commissioner, without any new appointment, so far as appears from the record, executed another conveyance on the 27th of July, 1839, which was recorded two days afterwards.

The defendant, Hamer, sold lot No. 77, which in the partition fell to the plaintiffs, to a man named Garr, at what precise time does not appear, but it was probably in 1836 or '37. Garr entered upon the lot, and erected a dwelling house worth some twenty-five hundred dollars, and made it his residence. It was a frame building resting upon wooden blocks or pillars, not otherwise attached to the soil, except by the chimney, which was of brick, and the foundation of which extended some inches under the surface. A writ of forcible entry and detainer was brought by the plaintiffs against Garr in August, 1839, which was decided in their favor, and about the time of its determination the buildings were removed from the lot by the directions of Hamer, and with the consent of Garr.

This action was then brought, and a verdict was rendered for the defendant. The plaintiffs in error contend that the house thus erected became a part of the freehold; in other words, became a fixture to the soil which belonged to it, and could not rightfully be severed from it.

The term fixtures is applied to "articles of a personal nature which have been affixed to land." Ferard's Law of Fixtures, p. 1. It is

a maxim of the law of great antiquity, that whatever is fixed to the land is thereby made a part of the realty to which it adheres, becomes parcel of the freehold, and partakes of all its incidents and properties. *Ib.* 9. This is the general rule, but many exceptions and qualifications have been engrafted upon it, from a concern for the interests of trade and manufactures, for the convenience and comforts of tenants, and from the varying exigencies of society. The greatest relaxation of the rule is admitted in the case of landlord and tenant, in favor of the latter, and tenant for life and remainder man, in favor of the former. It is applied with the greatest strictness between the heir and executor, and vendor and vendee. In England we find every grade and variety of decision, from *Lushington v. Shewell*, 1 Sim. 435, which decides that the devise of a West India estate would pass the stock of slaves, cattle and implementz, as incidental to the freehold, and essential to its enjoyment, — to those cases which hold that any building upon blocks, rollers, stilts or pillars, may be removed as not parcel of the freehold. 2 East, 88; 1 Taunt. 20; 3 East, 55; Ferard, 281. The cases were collected and commented on, and a very liberal extension of the general rule allowed in *Walker v. Sherman*, 20 Wendell, 636; and again in *Vanness v. Packard*, 2 Peters, 137. In this last case it was permitted to a tenant to remove a two story building which he had erected upon the premises for the residence of his family, as it was built for the more beneficial exercise of his trade, and for greater accommodation in that particular.

It is useless to enter upon a critical examination of the cases upon this subject, because they relate to controversies between persons standing in a different attitude from those before the court in this instance. The modifications of the rule seem to have been admitted from time to time, from the force and pressure of peculiar circumstances.

It is insisted that this is a case of intrusion upon the freehold of another without authority, and that in this particular it differs essentially from those in which one builds upon the land of another by his parol license. In such case as the last, the builder may remove his erections at pleasure. *Osgood v. Howard*, 6 Greenl. 404; *Russell v. Richards*, 1 Fair. 429; 4 Mass. 514. These cases concede the general principle, that whatever is annexed to the freehold becomes part of it; but they decide that the rule cannot apply when the owner of the soil has given his consent to the building. The inherent good sense upon which they rest commends them at once to the approbation of every mind.

The legal effect of the annexing of a personal chattel to the freehold by a stranger, without consent, is thus stated by an old writer: "Property may accrue from the fraud and folly of another; as where persons with an evil intent, or through ignorance, build with their own timber on another's soil. In such case, what is built shall be the owner's of the soil, upon presumption that they were given to him. But if any one perceives his folly, he may lawfully remove his timber,

so as he does it before our writ of prohibition comes against him, and before the timber is fastened with nails." Britton, chap. 33, as quoted in Ferard, p. 241, n. It is decided in Massachusetts that if one erects buildings on the land of another, without any contract, he may not remove them. *Washburn v. Sproat*, 16 Mass. 449. This is unquestionably the general rule of law, and it comprehends the case before us.

We have been referred to the case of *Wickliffe v. Clay*, 1 Dana, 591. So much of the opinion of the court, as relates to our present object of inquiry, is in these words: "There is no reason to doubt that Lytle, under whom Clay claimed, took possession of the lot, not as a wilful trespasser, but in good faith, not knowing or apprehending any other title, and that while thus possessed he erected the stable in equal good faith; and therefore he or any other person claiming under him, had a perfect right, according to the doctrines of the civil law,¹ altogether consistent in this respect with the principles of the common law, to remove the stable without doing any injury to the lot itself, whilst he was in possession; and consequently by such a removal no liability was incurred to the true owners of the lot." We cannot concur in the opinion of that learned court in its view of the common law upon this point, as we have already stated our belief of the true rule. But this was a case in chancery; and it would be for a court of chancery here, upon proper application, to decide whether there are any equitable circumstances in this cause, either upon the ground of mistake, want of notice upon the part of Garr of the rights of the plaintiffs, or from other cause, which would justify its interposition.²

A new trial will be granted in this case, because the law seems not to have been correctly interpreted in the court below; but in such trial it may be worthy of inquiry whether Quackenboss, the commissioner, had any power, as commissioner, to convey at the date of his deed, or whether his functions had not previously ceased.

Judgment reversed, and new trial granted.

GIBBS v. ESTEY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1860.

[Reported 15 Gray, 587.]

ACTION of tort for breaking and entering the plaintiff's close and digging up and carrying away a house. Answer, that the house was the personal property of the defendant Estey.

¹ See Inst. 2, 1, 30. — ED.

² See 2 Kent, Com. 334 *et seq.* — ED.

At the trial in the Superior Court before *Rockwell, J.*, there was evidence that the close was in 1850 owned by Ira Haskell; that he, while in possession of the land, assented to the erection of a house thereon by Warren Gibbs, and agreed that Gibbs should hold the house as personal property; and that this assent was given and agreement made after the cellar had been dug, the cellar wall and underpinning stone laid, the frame of the house erected, and while the work of building was still going on. The judge ruled that such assent and agreement, to be effective, must have been before or at the time when the frame of the house was erected.

The judge rejected evidence, offered by the defendants, of the declarations of Solomon Gibbs, Haskell's grantee and the plaintiff's grantor, while in possession of the land, that he neither owned nor claimed the house.

There was evidence that Estey bought the house of Warren Gibbs as personal property, and afterwards bought the equity of redemption of the land at a sale on execution against Solomon Gibbs; that he subsequently released to Solomon the rights acquired by this purchase, and remarked to him, at the time of delivering the release, that he should abandon his claim to the house, as he had been advised by counsel that he could not hold it. The judge instructed the jury that if, at the time of delivering such release, Estey verbally relinquished his claim to the house, neither he, nor any one claiming under him, could afterwards legally assert any title to it, by virtue of any previous title to it as personal property.

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

G. T. Davis, for the defendants.

S. T. Spaulding, for the plaintiff.

DEWEY, J. The plaintiff has acquired an undisputed title to the real estate described in his writ by sundry conveyances passing the title of Ira Haskell as he held the same at the date of his deed to Solomon Gibbs. It is conceded that this title of Haskell was originally a valid one, and sufficient to pass the estate in the land; but it is contended that the house standing thereon, and which is the subject of the present controversy, was the personal property of Warren Gibbs, under whom the defendants claim title. The question in the case is therefore whether this house was real estate and passed by the various conveyances as such, or was personal estate capable of being held and sold irrespectively of its connection with the land. If it was a part of the realty, it has duly passed to the plaintiff. The general rule is that a building like a house, erected on the land, will of course become a part of the realty, and as incident thereto will pass with the land. An exception to the rule has been held to exist in cases where the owner of the land has given permission to another person to erect a building upon such land, to be held and enjoyed as his own as personal property. Such separation of the personal from the real estate to which it is

attached is to be established by evidence of assent to the erection of the same, before the structure is erected and has become attached to the realty, and thus had its character fixed. That essential element was wanting in the present case. It is shown in this case that the time of giving such assent was after the digging of the cellar, the laying of the cellar wall and underpinning stone, and the erection of the frame of the house thereon, and while the process of further completing the building was going on. The instruction of the court, that such assent, to be effective, must have been given before or at the time when the frame of the house was erected, was correct. After that period of time, the building, though it might be an unfinished building, was a building attached to the real estate, and would pass as such. The intention of the parties, if it existed, to change this to personal property, was one which the law could not carry into effect. *Richardson v. Copeland*, 6 Gray, 538. Such being the case, the house would in law pass by the various conveyances of the real estate upon a part of which it stood.

The declarations of Solomon Gibbs, one of the intermediate owners, while he owned the real estate, that the house was not owned or claimed by him, would not defeat the title legally in him, and which he has passed to the plaintiff.

It is unnecessary to consider the further question of the effect to be given to the evidence of the declarations of the defendant Estey, wholly relinquishing his claim to the house at the time of making his quitclaim deed of the land to Solomon Gibbs, the grantor of the plaintiff. In the view the court take of the case, the first ground is decisive in favor of the plaintiff, without any aid from these declarations.

Judgment for the plaintiff.¹

¹ *Contra*, *Fuller v. Tabor*, 39 Me. 519 (1855).

"It is argued on behalf of the assignees that a contract to treat fixtures as chattels, whether it be express or implied, must be made before they are actually affixed to the realty; and for this some remarks of Dewey, J., delivering the opinion of the court in *Gibbs v. Estey*, 15 Gray, 587, are quoted. But those remarks appear to be intended only for parol agreements concerning buildings and fixtures annexed by a stranger, and to mean that such a parol agreement or license cannot change real into personal estate after its character has been once established. So if the question here were between the petitioner and the savings bank, no mere oral license of the latter, given after the engines were set up, could be shown. Growing wood or crops may be sold by parol, with a parol license to sever them; and I am much inclined to think that trade fixtures might be. At all events there can be no doubt that the owner can in writing and for a valuable consideration convey severable chattels in such a way as to bind himself and his assignee in bankruptcy by estoppel at least. The discussions of the question whether fixtures have passed by a deed or mortgage all assume, and many of them express that if the owner chooses to except the fixtures out of his conveyance of the fee, he may lawfully do so. Two or three decisions in England, which are thought to state the law too strongly against mortgagees, are yet supported on the ground that the particular conveyances may be construed as including or excluding the fixtures as the case may be. See *Waterfall v. Penistone*, 6 E. & B. 876; *Trappes v. Harter*, 2 C. & M. 153; *Cullwick v. Swindell*, L. R. 3 Eq. 249; *Colgrave v. Dias Santos*, 2 B. & C. 76; *Harlan v. Harlan*, 20 Penn. State, 303. So in *Richardson v. Copeland*, 6 Gray, 538, the Chief-Justice says: 'No title to these articles passed to the mortgagees which they could assert against a third party,' referring, no doubt, to a prior

SECTION II.

RIGHTS OF THIRD PERSONS.

RUSSELL v. RICHARDS.

SUPREME JUDICIAL COURT OF MAINE. 1833.

[Reported 10 Me. (1 Fairf.) 429.]

THIS was an action of trover for a saw mill, mill-chain and dogs. On trial it appeared, that the land and privilege upon which the mill was built, at the time of the erection, in 1824 or 1825, belonged to William Vance. That Shubael B. Vance and Asa Church had bargained by parol with the said William Vance for the purchase of the privilege, and had caused the mill to be built thereon, through the agency of one Seth Emerson, by the permission of the said William Vance. It further appeared, that when Emerson contracted to build the mill, he took the guaranty of William Vance for the eventual payment of the sum he was to receive. That Shubael Vance and Church being delinquent in payment, Emerson, by the request of William Vance, instituted a suit against Shubael Vance and Church, and attached the mill as their personal property; and having obtained judgment against them for about \$800, he put the execution issuing thereon into the hands of an officer, by whom the mill was duly sold to the plaintiff in this action for about \$300, on the 8th of September, 1827, William Vance himself being present at the sale, and declaring that he had no claim upon the mill, but only upon the privilege. It appeared that soon afterwards the mill went into the possession and occupancy of William Vance, and on the first day of April, 1830, was in the occupancy of his lessee, on which day he conveyed the mill and privilege, by deed of warranty, to the defendants.

Upon this evidence, the jury were instructed, that although as against William Vance the mill might be seised and sold as personal property, and against the defendants also, if they purchased with a knowledge, or had notice of the plaintiff's interest and claim, yet if the jury were not satisfied from the evidence that the defendants had such notice, they had a right to hold the mill as real estate, under their deed; and that in that case they should find for the defendants, which

incumbrancer or an innocent purchaser of the land, as in *Hunt v. The Bay State Iron Co.*, and as the defendant in the case then before the court seems to have been in effect. The assignee is not a third party, in this sense." — *Per* LOWELL, J., in *Ex parte Ames*, 1 Low. 561, 567.

See *Madigan v. McCarthy*, 108 Mass. 376; *Aldrich v. Husband*, 131 Mass. 480; *Hines v. Ament*, 43 Mo. 298; *Meyers v. Schemp*, 67 Ill. 469.

they accordingly did. If the jury were properly instructed, judgment was to be rendered on the verdict, otherwise it was to be set aside and a new trial granted.

Sprague, for the plaintiff.

Allen and *Boutelle*, for the defendants.

The opinion of the court was delivered at the ensuing June term in Penobscot, by

MELLEN, C. J. The saw mill in question was built on a tract of land, at the time belonging to William Vance, at the expense and as the property of his son, Shubael V. Vance and Asa Church, and by the permission of Vance, the father. The case finds an open and express disavowal by the father of any interest in or claim upon the mill. On these facts, according to the case of *Wells v. Bannister & trustee*, 4 Mass. 514; *Osgood v. Howard*, 6 Greenl. 452, and *Van Ness v. Packard*, Peters' R., the mill was never the property of William Vance, and never became a part of the freehold, but was personal property belonging to Shubael B. Vance and Church, and as such, in September, 1827, was legally seised and sold, on Emerson's execution against them, to Russell, the plaintiff, for about \$300. It does not appear that Russell ever had any actual possession of the mill; but soon after the sale it went into the possession and occupancy of William Vance, and then into the possession of his lessee. On the 30th of March, 1830, William Vance conveyed several tracts of land, and among them the tract on which the mill in question was erected, and the mill and mill privilege thereon, to the defendants in this action, for a valuable consideration; and the jury have found that they had not any knowledge or notice of the plaintiff's title and interest at the time of their purchase. The question is, whether on these facts the plaintiff is to be deemed in law the owner of the mill, and entitled to recover damages, or whether it was legally conveyed to the defendants, and became their property, according to the instructions of the presiding judge. The case before us is not tinctured with any fraud or intimation of it. Who, then, has the better right? What authority had William Vance to sell the mill to the defendants, when he did not own it, or pretend to own it? And what act has the plaintiff done or omitted to do, by means of which he has lost his property and the defendants acquired it? It is certainly a correct principle of law, that one man cannot transfer the title of another to real or personal property without his consent, express or implied, unless in certain cases, under statutory provisions; as in case of sales by guardians, executors or administrators; or where it is transferred by the levy of an execution or a sale of chattels by an officer on execution; or cases similar in principle. We cannot perceive how the want of actual possession of the mill can be considered as having affected his title during the interval between the sale of it to the plaintiff in 1827, and the conveyance to the defendants in 1830. If A. is the unquestioned owner of a carriage and horses, and places them under the care of B., his friend, while A. is on

a voyage to Europe, B. cannot deprive A. of his ownership and convey a title to C., and enable him to hold them against A. If he could, a man could never be secure as to his title to personal property, unless he or some one in his behalf were to stand sentinel over it.

The case before us differs essentially from what it would have been if William Vance had owned the mill, and, being insolvent, had conveyed it to Russell, but still had remained in open possession and sold it to the defendants, *bona fide* purchasers, and for a valuable consideration. Russell's want of possession would be strong evidence of the fraud. It differs also from a sale made honestly by A. to B. of a bale of goods in payment of a debt, but before B. obtains a delivery and possession of the bale, C. attaches it for a debt due from A. to him; for in this case C. obtains possession first, and thus has the better title to the goods, as was decided in *Lanfear v. Sumner*, 17 Mass. 110. There, both parties claimed under the same person; but Russell claims under the former undisputed owner, and the defendants under a man who never had any property in the mill. The question as to priority of possession, therefore, is not presented in the case before us as having any legal influence; but the decision of the cause depends on priority of right; and William Vance had no more right to sell the mill than if Russell had been in exclusive possession of it. But it is urged that the defendants had a right to presume the mill to be a part of the freehold, and that such is always the presumption. In the present case, however, the fact was otherwise. But surely the possession of real estate is not considered stronger evidence of title than the possession of personal property. In the latter case a sale of a chattel in the possession of the vender amounts to a warranty of title; not so in case of real estate. That is, in case of chattels, the possession of them at the time of sale is so far evidence of title as to make the sale a warranty to the purchaser, but not sufficient to convey property which he did not own.

But independently of the reasoning by which we have arrived at the above conclusion, and of the principles on which we have relied, we would observe, that according to the principles of the common law in England, which have long been recognized and adopted, and even extended in this country, the mill in question must be considered personal estate, and that it never was a part of the freehold and subject to the control of the owner of the land. It was a building erected for the purposes of trade and the manufacture of boards and other lumber; the manufacture and sale of which articles constitute the principal business of that section of the country. In this view of the subject, the decision is placed on grounds which cannot now be shaken, without disturbing rights and unsettling principles.

In the instance before us, the remedy of the defendants is on the warranty of William Vance. The principles stated in Judge Trowbridge's Reading, and those also in Dane's Abridgement, which have been cited, have more immediate reference to real estate. and can have

no peculiar application to the present case. Our opinion is, that the instructions of the judge, on the point reserved, were not correct.

*Verdict set aside and a new trial granted.*¹

¹ "In these cases it is said that, without notice, subsequent *bona fide* purchasers of title to the road would not be affected by such private agreement, changing the natural and legal character of the road from real to personal, but would have a right to suppose that they acquired all the incidents and appurtenances which, by the general rules of law, would result from such a purchase. How far this qualification of the general principle, stated in these cases, would obtain as a rule of construction in this State, may be an important question not now necessary to decide. The case of *Russell v. Richards*, 10 Maine, 429, and subsequent cases, establish the doctrine here that *bona fide* purchasers who, even without notice, acquire the title to land, are not entitled to claim such structures as a house, store, or mill standing on the land at the time of purchase, if such buildings were, at such time, the property of a third person, although from their situation upon the land they had the appearance of being a part of the realty. The case of *Russell v. Richards* does not accord with the adjudged cases in Massachusetts and New Hampshire in this respect, and the general course of decision is rather opposed to it. See enumeration of cases compared in the extensive notes to the case of *Elwes v. Mawe*, 2 Smith's Lead. Cas. 99." — PETERS, J., in *Fifield v. Maine Central R. R. Co.*, 62 Me. 77, 80.

"This word 'fixture' is used in a variety of senses. In its broadest signification it is sometimes used to designate anything which is by artificial means attached permanently or substantially to the soil or freehold. But there is another and more technical meaning sometimes given to the word. That is, something substantially affixed to the land, but which may afterwards be lawfully removed therefrom by the party affixing it, or his representative, without the consent of the owner of the freehold. It is in this latter sense that the word is used in this opinion. Fixtures of this kind have been held by many courts in the United States as personal property, even whilst attached to the soil. As they are the personal property of the party attaching them to the soil before they become fixtures, and as he has the right to remove them at any time, and again convert them into personal property, some courts have seen proper to hold them all the time as such. Under this view of the case, courts in Maine, Massachusetts and New York have sustained actions of trover for fixtures that were never removed or detached from the freehold. See *Russell v. Richards*, 1 Fairfield, 429; *Ford v. Cobb and others*, 20 N. Y. (6 Smith) 344; *Smith et al. v. Benson et al.*, 1 Hill, 176; *Wells v. Bannister*, 4 Mass. 514; *Ashmun v. Williams*, 8 Pick. 402.

"In all these cases the courts call the things which are the subject of litigation personal property, although they are, technically, fixtures; that is, things attached to the land, but with a privilege on the part of some one other than the owner of the land to remove them. If these cases be law, then we have no doubt of plaintiffs' right to recover in this action, for these pans, etc., clearly became fixtures under the contracts with the Phoenix Mill Co. and Wells, Fargo & Co. The sale of the property and purchase thereof by McLane for Wells, Fargo & Co. did not change their status. There can be no doubt but that as long as either the one or the other of these parties held the mill, the plaintiffs had a right to take off the pans. McLane, acting for Wells, Fargo & Co., converted the pans by selling them with the mill. No other proof of conversion but the sale of the mill with its fixtures was necessary. Under these authorities, Booth & Co. could either treat the sale by McLane as a conversion and sue Wells, Fargo & Co., or might demand the pans, etc., from the present owners of the mill, and on their refusal to surrender, sue them.

"But whilst these authorities, highly respectable in character, support this view of the case, the writer of this opinion cannot but dissent from the views expressed in all these cases. In my opinion, property is either real or personal, according to its nature. Contract cannot make a chattel realty, nor realty a chattel. The case cited

RICHARDSON v. COPELAND.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1856.

[Reported 6 Gray, 536.]

ACTION of tort for the conversion of a steam-engine and boiler, which were manufactured and set up by John Putnam and others, under a contract with Josiah Richardson, upon his land in Leominster, in a building erected for the purpose of receiving them, and were used to run the machinery in the adjoining shop of said Richardson. The boiler was set into the brick-work in such a manner that it could not be removed without taking down the brick-work; and the engine was placed upon a granite block, and fastened by a bolt or pin. After the work was finished and the engine was in operation, said Putnam and others gave a bill of sale of the engine and boiler to Richardson; and at the same time received back a mortgage thereof, which was recorded as a mortgage of personal property; and afterwards, upon breach of the condition thereof, due notice was given of intention to foreclose the same as such a mortgage. Richardson subsequently became insolvent, and said real estate was sold by his assignees by order of the commissioner, on the petition of mortgagees thereof, (some of whose mortgages were made before the erection of the engine and boiler, and some since,) to one Harlow, who had full knowledge of the mortgage to Putnam and others, and of the proceedings thereon, and who afterwards sold the engine and boiler to the defendant, to be taken away, and the defendant removed them. The plaintiff afterwards purchased

from 1 Fairfield shows the danger of such departures from common-law principles. In that case, a man buys a piece of land with a saw mill on it. He knows nothing about anybody but the owner of the freehold having any claim to the mill. But after the purchase, he is sued for the mill, and its value recovered from him. If such a doctrine is tenable, then the man who buys a lot covered by a brick house may, without any negligence on his part, be compelled, after having paid the owner of the soil for lot and house, to pay somebody else for the house. Such a doctrine appears to me extremely dangerous. The New York courts seem to hesitate in following the Maine case to its legitimate result. They seem only willing to apply the principles of this case when the property in controversy approaches the character of personalty in its nature. But if mere contract can convert potash kettles built into a wall in such a manner as to be firmly attached to the freehold, then it can also convert saw mills and granite walls into personalty. In my opinion all fixtures whilst attached to the freehold are, for the time being, a part of the realty. No contract can change their nature. It is true there may be a contract allowing some one to take them off. Indeed, unless there be some contract, law or custom allowing such removal, they are not technically fixtures. But a contract that something may be converted into personalty at a future day does not make it so from the time of the contract. The owner of the land might make a contract allowing another to take off all the soil to the depth of ten feet for making brick; but the contract alone would not convert the surface of the soil into bricks or other personal property. It would still be a part of the freehold. In my opinion this complaint should be treated not as a declaration in tort, but as one on contract. As such I believe it to be sufficient." — BEATTY, C. J., in *Prescott v. Wells*, 3 Nev. 82, 89-91.

all the rights of Putnam and others, and gave notice thereof to the defendant, and demanded the property of him.

The plaintiff also offered to prove that, by the general usage and custom of trade between manufacturers and vendees of such property, it was regarded and treated in all respects as personal property. But the Court of Common Pleas held the evidence incompetent.

The parties submitted the foregoing case to this court, with an agreement that if, upon the facts stated, the action could be maintained, or if the evidence offered was competent, the case should stand for trial; otherwise, judgment for the defendant.

N. Wood, for the plaintiff.

J. W. Fletcher and *C. Devens, Jr.*, for the defendant.

SHAW, C. J. This is an action of tort, in the nature of trover, to recover the value of a steam-engine and boiler. To maintain this action, the plaintiff must prove property in himself, and a conversion by the defendant.

Upon the facts stated, the court are of opinion that the engine and boiler, having been erected on the premises of Josiah Richardson, of which he was then the owner in fee, subject to several mortgages, became annexed to the freehold. *Winslow v. Merchants' Ins. Co.*, 4 Met. 306. This real estate comprised a manufactory occupied and carried on by said Richardson, and the engine was erected to furnish power for such manufactory. The steam-boiler was permanently set in brick-work, and could not be removed without taking down the brick-work, and the engine was permanently annexed to the buildings. This permanent annexation of the engine and boiler to the freehold, *de facto*, rendered them part of the realty; and his agreement with the builders to give them a mortgage thereon as personal property, as against all those who took title to the estate in fee, was inoperative and void. No title to these articles passed as personal property to the mortgagees which they could assert against a third party. The engine and boiler thus remained part of the realty till Josiah Richardson became insolvent, and the estate passed to his assignees, subject to the right of the mortgagees of the real estate; it was rightly sold by order of the commissioner, on their petition, and a good title passed to Harlow, the purchaser. He afterwards severed them, and thus reconverted them into personal property, as he lawfully might, and sold them to the defendant, who thereby took a good title.

The evidence of usage was rightly rejected; it could not be received to control the operation of law, arising from the actual annexation of the engine and boiler to the freehold. If it be said, it might have tended to show the intent of the parties; the answer is, that the intent of the parties was manifest enough from the agreement of the parties and the mortgage. But the difficulty was, (by mistake of the law, no doubt,) that this intention was one which the law could not carry into effect, that of hypothecating a portion of the realty, as personal property, without severance.

The fact, that Harlow had full knowledge of the history of the mortgage, did not impair his right to be a purchaser.

It is to be observed, as a fact important to the present case, that the engine and boiler were purchased and set up in the factory by one who himself owned the freehold. Had they been so bought and placed by a tenant on leased premises, the case might have presented a different question.

*Judgment for the defendant.*¹

FORD v. COBB.

COURT OF APPEALS OF NEW YORK. 1859.

[*Reported 20 N. Y. 344.*]

APPEAL from the Supreme Court. Action to recover damages for an alleged illegal entry upon the plaintiff's premises, and taking, removing and converting twenty-three salt kettles. On the trial before a referee, it appeared that on the 6th September, 1855, one Orrin W. Titus was in possession of a lot of land, known as block No. 55, in the village of Liverpool, Onondaga County, upon which he had erected works for the manufacture of salt. On that day he purchased of the defendants fifty iron salt kettles, and certain iron arch pieces, arch fronts and grates, to be put up in said salt works, for the price of \$955.60, for which he gave his promissory notes, payable in November, July, and August next after the purchase. He also executed to the defendants a chattel mortgage upon said articles, which recited the sale and that the kettles, &c., were about to be taken from Syracuse to Liverpool, and to be set up in the aforesaid salt block. It was conditioned to be void if Titus should pay the notes at their maturity; otherwise to be an absolute transfer to the defendants. Titus was to remain in possession until default unless the defendants should consider themselves insecure; in which case they had a right to take possession of the property and apply it to the payment of the debt, and Titus was to pay the deficiency, if any. The mortgage was duly filed in the clerk's office of Onondaga county, and was continued in force by refiling according to the statute. Titus thereupon set the kettles in arches, upon the salt block, in such manner that they could not be removed, except by tearing off a portion of the upper bricks of the arch, and prying the kettles out by a plank and bars. It was proved to be the general custom to take the kettles from the arch and to reset them every season before commencing boiling in the spring; and that these kettles had been taken out, reset in the fall of 1856, before the defendants took them, as afterwards mentioned; and that it would have been necessary again to take them out, and reset them the ensuing fall, if the defendants had not taken them.

¹ See *Dudley v. Foote*, 63 N. H. 57.

Titus was the beneficial owner of the lots on which the salt works were erected, in June, 1855, though the legal title was in Horace White, from whom he had an executory contract. He, Titus, had put up the frame of the salt works, and had covered the building; and some time in that month he made a verbal agreement with the plaintiff, to sell him an undivided half of this property, and of other real estate, for \$2,000, nearly all of which was paid down. By this agreement, Titus was to put in the kettles, half the cost of which was included in the purchase price, finish the salt block and wall it; and this he accordingly did by purchasing and putting in the kettles and otherwise; and he leased the whole to one Soule, who continued to run the salt works down to the time the defendants took the kettles. In October, 1855, Titus procured White, in whom the legal title was, to convey the lot to one T. O. Titus, and the latter, on the 21st March, 1856, by O. W. Titus' procurement, conveyed the same to O. W. Titus and the plaintiff, and in November, 1856, O. W. Titus conveyed his interest to the plaintiff.

On the 10th February, 1857, no part of the notes given for the purchase price of the kettles, except the first note for \$200, having been paid, the defendants entered upon the premises, and took and carried away twenty-three of the salt kettles, claiming them by virtue of the mortgage. They did no more damage than was necessary, but they were obliged to remove a part of the upper bricks of the arch, and to pry up the kettles, each of which weighed about 675 pounds, in the manner before mentioned; by which, as the referee found, the property was injured to the amount of \$50. The plaintiff was absent from the country, and did not know of the purchase of the kettles when it was made, or of the giving of the chattel mortgage, until the day the kettles were taken by the defendants. The referee held, as matter of law, that the kettles were a part of the realty, and that the plaintiff became the owner of them by his purchase of the land, and he awarded damages to \$461.77, for which judgment was entered; and it was affirmed at general term. The defendants appealed. The case was submitted upon printed briefs.

Philo Gridley, for the appellants.

James Noxon, for the respondent.

DENIO, J. The case is to be considered as though O. W. Titus was the owner of the land at the time he purchased the kettles and put them into the arch, and as though the plaintiff subsequently purchased the land from him, and took a conveyance of it without any notice of the defendant's claim to the kettles. This is the precise point of view in which the question has been regarded in the Supreme Court, and in the briefs which have been submitted by the counsel for the respective parties. The plaintiff, it is true, had made a verbal agreement with Titus, anterior to the time when the kettles were set, but the latter was in possession of the land as owner, with the plaintiff's consent, when he purchased and mortgaged the kettles; and it does not appear

that the defendants had any knowledge of the verbal arrangement between Titus and the plaintiff.

I shall assume, that if Titus had paid for the kettles when he purchased them, instead of mortgaging them for the purchase price, the manner in which he annexed them to the freehold was such as would have converted them into a parcel of the realty; and that they would have passed to his subsequent grantee of the land, or would have gone to his heirs or devisees if he had died without conveying it. It is very clear that this would have been so at the common law and independently of the provisions of the Revised Statutes. The case of the salt pans, decided by Lord Mansfield, where it was held that fixtures, very similar in their purpose and mode of annexation with these now in question, belonged to the heirs and not to the executors, has been very generally followed in England and in this country. *Lawton v. Salmon*, 1 H. Bl. 258, note; and see *Murdock v. Gifford*, 18 N. Y. 28, and cases cited. There is room for an argument, that the rule thus established has been modified by the provision of the Revised Statutes, which declares that "things annexed to the freehold or to any building for the purpose of trade or manufacture, and not fixed into the wall of a house so as to be essential to its support," shall go to the executor or administrator to be applied as part of the personal property. 2 R. S. 82, § 6, subd. 4. Apparently it was the intention of the Legislature to abolish the distinction, which had become well established, between the rights of a tenant to remove certain kinds of fixtures which he had himself annexed to the freehold of the demised premises, and those of the heirs or devisee. If that is the true construction of this provision, the kettles in question ought to be held to be personal property, and the plaintiff, who makes title only by means of a conveyance of the land, would have no case. But the important and unexpected consequences which it was seen would flow from such an interpretation have caused the courts to hesitate; and in *House v. House*, 10 Paige, 158, Chancellor Walworth decided that the millstones, bolts and machinery of a flouring mill were parcel of the real estate and descended to the heirs of the owner, holding, as I understand the case, that the rules of the common law upon the distinction referred to, still prevailed; and the present Chief Judge, in giving the opinion of this court in the case of *Murdock v. Gifford*, 18 N. Y. 28, seemed inclined to adopt the conclusion of the Chancellor. But the point was not necessary to the decision of that case, as the fixtures there in question were held to be personal property, according to the former decisions, in any aspect in which the question might be presented. The reasoning of the Chancellor, in *House v. House*, is not altogether satisfactory to my mind; but as the judgment in that case may be said to have become a rule of property, it should not be disturbed without the greatest consideration, and certainly not in a case like the present, which may be satisfactorily disposed of on other grounds.

Assuming then that these kettles would be parcel of the real estate

if the owner of the land was the unqualified owner of them when they were put up in the arch, we are to determine as to the effect of the arrangement in this case by which the owner of the land and the owner of the kettles agreed, that notwithstanding their annexation to the freehold in the manner which was contemplated, they should continue to be personal property so far as should be necessary to give effect to the personal mortgage. It will readily be conceded that the ordinary distinction between real estate and chattels exists in the nature of the subject, and cannot in general be changed by the convention of the parties. Thus, it would not be competent for parties to create a personal chattel interest in a part of the separate bricks, beams or other materials of which the walls of the house were composed. Rights by way of license might be created in such a subject, but it could not be made alienable as chattels, or subjected to the general rules by which the succession of that species of property is regulated. But it is otherwise with things which, being originally personal in their nature, are attached to the realty in such a manner that they may be detached without being destroyed or materially injured, and without the destruction of, or material injury to the things real with which they are connected; though their connection with the land or other real estate is such that in the absence of an agreement or of any special relation between the parties in interest, they would be a part of the real estate. The cases respecting trade fixtures put up by a tenant sufficiently exemplify this distinction. Thus, in the case of the salt pans, which Lord Mansfield held belonged to the heirs, no doubt was entertained by him but that they might lawfully have been detached and taken away if they had been put in by a tenant. "It would have been a different question," he said, "if the springs had been let and the tenant had been at the expense of erecting these salt works; he might very well have said, I leave the estate no worse than I found it." All the cases upon this branch of the law of fixtures proceed upon the idea that erections which would clearly be a part of the realty under ordinary circumstances, are personal chattels as regards the rights of a tenant who has put them up for the purpose of trade or manufacture. *Penton v. Robart*, 2 East, 88; *Elwes v. Maw*, 3 Id. 38; *Buckland v. Butterfield*, 2 Brod. & Bing. 55; *Holmes v. Tremper*, 20 John. 29; *Miller v. Plumb*, 6 Cow. 665. If a subject which would otherwise be real estate can be made personal by the creation of special relations between the parties, it is clear that the same parties may effect the same thing by express agreement. Accordingly, it has been repeatedly held that erections which, by the general rules of law, would belong to the freehold, have become chattels in consequence of a contract to that effect between the owner of the land and the party claiming the erections as personalty. In *Smith v. Benson*, 1 Hill, 176, a building used as a grocery and dwelling-house had been erected under an agreement with the proprietor of the soil that it might be removed at any time. One who claimed title under the party who erected it, but who had no

interest in the land, mortgaged it as a chattel, and afterwards sold it as personal property. The question was between the mortgagee and the subsequent purchaser, and the former was allowed to recover in trover against the latter, who had converted the house. In answer to the objection that the building was real estate and therefore not the subject of such an action, Judge Cowen said that *prima facie* such a building would be a fixture and would not be removable; that the legal effect of putting it on another's land would be to make it part of the freehold. "But the parties concerned," he added, "may control the legal effect of any transaction between them by an express agreement." So in *Mott v. Palmer*, 1 Comst. 564, the defendant had sold and conveyed to the plaintiff by deed containing a covenant of seisin, a farm, certain of the fences standing upon which had been put up by a third person under an agreement with the defendant that he might take them off at his pleasure. This third party had recovered the value of the fences of the plaintiff, who had refused to let him take them off, in an action of trover, upon which the plaintiff sued the defendant, his grantor, for a breach of the covenant, and was permitted to recover the value of the fences. The recovery could be sustained only on the assumption that fences were *prima facie* parcel of the freehold, but might legally become personal property by force of such an agreement as was proved in the case. And in *Godard v. Gould*, in the present Supreme Court (14 Barb. 662), the plaintiffs had sold certain paper-making machinery, to be put up in a paper-mill, reserving, however, by express agreement, the title to the machinery as a security for the purchase money. It was accordingly put up, and afterwards the owner of the mill sold and conveyed it to the defendants, who had no notice of the plaintiff's rights. The deed, besides describing the land on which the mill stood, purported also to convey all the machinery in it. The action was for the conversion of the machinery by the defendants; and a recovery in favor of the plaintiffs was sustained by the court. It was considered that the machinery was personal property, by force of the arrangement under which it was placed in the mill, though its mode of annexation and adaptation to the purposes of the mill were such that it would have passed by a simple conveyance of the real estate but for the agreement by which the plaintiffs retained the right of property in it. Many other cases to the same effect will be found referred to in "Hilliard on Real Property," ch. 1, §§ 18-28.

It is conceded that there must necessarily be a limitation to this doctrine, which will exclude from its influence cases where the subject or mode of annexation is such that the attributes of personal property cannot be predicated of the thing in controversy. Thus, a house or other building, which from its size or the materials of which it was constructed, or the manner in which it was fixed to the land, could not be removed without practically destroying it, would not, I conceive, become a mere chattel, by means of any agreement which could be made concerning it. So of the separate materials of a building, and things

fixed into the wall, so as to be essential to its support; it is impossible that they should by any arrangement between the owners become chattels. The case of *Fryatt v. The Sullivan Co.*, 5 Hill, 116, was correctly decided upon this distinction. A certain steam-engine and boiler were leased, and the lessees took them to their smelting works, and affixed them so firmly to the freehold that they could not be removed without destroying the building in which they were placed. The defendants made title to the building, under a mortgage executed after the engine had been thus annexed, and the owner of the engine and boilers brought trover for them. It was held, that the articles had been converted into real estate, and that the remedy of the plaintiff was against the party who wrongfully converted them from personal into real property; and that the action could not be sustained against the owners of the real estate.

The question in the present case, therefore, is, whether the method in which these salt kettles were affixed to the freehold was such that they can still be claimed as chattels, upon the principle of the first mentioned cases, or whether they are to be considered as real property within the one last referred to. There is no pretence that they were necessary to the support of the building, or that their own condition was essentially changed, or their value diminished, by being detached from the arch. They were of value after being removed, as second-hand kettles, and could be again put up in another arch; but taking them out involved the displacement of certain of the bricks of which the arch was composed. I do not think this a controlling circumstance, especially as it is found by the referee, that they required to be taken out and re-set as often as once a year, in the ordinary course of the business of manufacturing salt. This involved a certain amount of expense, whether it was done for the purpose of re-setting, or with a view of finally disconnecting them with the arch. I do not think that it required any such destruction of the subject, or serious damage to the freehold to which they were attached, as to render void the arrangement by which it was agreed that they should continue to be personal property, for the purpose of removal, in case default should be made in the payment of the purchase money. They were not so absorbed or merged in the realty, that their identity as personal chattels was lost; and unless such an effect has been produced, there is no reason in law or justice for refusing to give effect to the agreement, by which they were to retain their original character.

I conclude, therefore, that the defendants were entitled, as against O. W. Titus, to detach the kettles from the arch and take them away, after default had been made in the payment of the purchase price; and the only remaining question is, whether the plaintiff is in any better position than that which Titus occupied. The kettles were originally personal property. The agreement contained in the chattel mortgage preserved their character as personalty, which would otherwise have been lost by their annexation. They, therefore, continued to be per-

sonal chattels notwithstanding the annexation; and the plaintiff, by filing the mortgage, observed all the formalities required by law to preserve their lien upon that kind of property. The title to the kettles did not, therefore, pass by the conveyances to the plaintiff. Those conveyances embraced only the interests which the grantors had a right to dispose of, including any advantage which would accrue to the grantee by the *laches* of the former owners, in giving the constructive notice which the law required to be given; but I do not see that any such *laches* occurred. This seems to me the true state of the case upon principle. But it is also sustained by authority. The case of *Mott v. Palmer*, already referred to, necessarily involved this point. It was held, that the covenant of seisin was broken at the time of the execution of the deed, because the fences which were embraced in the general description of the property professed to be conveyed, did not pass by it; and the reason they did not pass was, that they had been saved from merging in the freehold by an agreement in character precisely like the one set up by the present defendants. If it could have been maintained that they passed by the deed, because they were apparently parcel of the realty, and because the grantee had no notice of the special arrangement, no recovery for a breach of the covenant of seisin could possibly have been sustained. This decision, pronounced by our predecessors in this court, is of the highest authority with us, and is decisive of the point. There is a case equally in point, in the Supreme Court of New Hampshire [Maine]. The action was trover for a saw-mill, mill chain and dogs. The defendant made title under a deed of the land on which the mill stood; and the evidence showed that he had no notice of the special facts upon which they were claimed to be personal property. Those facts were, that the defendant's grantee, the owner of the land, was a party to an arrangement by which that mill had been sold to the plaintiff as personal property. It was decided that the action was maintainable, and the plaintiff had judgment. *Russell v. Richards*, 1 Fairf. 429. The case of *Godard v. Gould*, before referred to from the reports of the present Supreme Court of this State, is to the same effect.

These considerations lead to a reversal of the judgment of the Supreme Court in the present case, and to the award of a new trial.

JOHNSON, C. J., STRONG, ALLEN, GRAY, and GROVER, JJ., concurred; COMSTOCK, J., dissented.

*Judgment reversed, and new trial ordered.*¹

¹ See *Tift v. Horton*, 53 N. Y. 377; *Case v. L'Oeble*, 84 Fed. R. 582; *Adams Mach. Co. v. Interstate B. & L. Assn.*, 119 Ala. 97.

As to the position of a purchaser of fixtures from a mortgagor, see *Hoskin v. Woodward*, 45 Pa. 42.

CLARY v. OWEN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1860.

[Reported 15 Gray, 522.]

ACTION of tort by the assignee in insolvency of Heman D. Burghardt, for the conversion of four water-wheels, with the shafts, couplings, and other machinery connected with them. At the trial in the Superior Court the plaintiff introduced evidence of the following facts :—

In 1854 Burghardt contracted with John E. Potter, who then owned certain real estate in Barrington, to furnish the water wheels and machinery, and to set them up in wheel-pits to be prepared by Potter on the premises, for the sum of \$3,500, of which \$500 was paid at once, and the balance was to be paid on the completion of the work, in notes secured by a mortgage of the property, or by a mechanic's lien.

In the latter part of 1854, Burghardt, in pursuance of this contract, constructed the wheels in question, which were made of cast iron and placed in pairs upon cast-iron shafts, and set them up in penstocks and a flume, the frame of which rested on a stone foundation built by Potter in all respects like the foundation of a building. The wheels were intended for the purpose of driving a paper-mill on the premises; they were outside of the paper-mill building, but the mill could not be used without them.

In January, 1855, before the completion of the wheels and fixtures, the mill was destroyed by fire; Potter failed, and abandoned the work; and Burghardt never fulfilled his contract and never received any payment or security, except the \$500 paid at the time of making the contract; never delivered the wheels, except in so far as setting them up as above described amounted to a delivery; never offered to return the money which he had received, and never called on Potter for any payment.

When the contract was made the premises were subject to certain mortgages, which were afterwards assigned to the defendants, who had previously had notice that Burghardt claimed to own the wheels and machinery, and who, a year after the fire, took possession of the premises, which were in the condition in which the fire had left them, to foreclose the mortgages, and afterwards purchased the equity of redemption.

Upon this evidence, *Putnam, J.*, ruled that the wheels having been placed on the premises after the execution of the mortgages, the action could not be maintained. The plaintiff then offered to show that, by the agreement between Burghardt and Potter, the wheels were to remain the property of the former until completed, and payment for them secured by mortgage; but the judge ruled that, even if that were proved, the plaintiff could not maintain his action, and directed a ver-

dict for the defendants, which was returned, and the plaintiff alleged exceptions.

J. D. Colt, for the plaintiffs.

J. E. Field and *M. Wilcox*, for the defendants.

HOAR, J. It is conceded in the argument of the plaintiff's counsel, that the mill-wheels, for the value of which this action was brought, must be considered, as between mortgagor and mortgagee, fixtures belonging to the realty. They were essential to the operation of the mill, and were intended, when completed and paid for, to be permanently attached to the land. If the mortgagor had himself annexed them to the freehold, there could be no doubt that the mortgagee would hold them under his mortgage, and that they could not be severed without his consent. *Winslow v. Merchants' Ins. Co.*, 4 Met. 306. But it is contended that the mortgagor being in possession, and having agreed with Burghardt that the wheels should remain the personal property of the builder until they were completed and provision made for paying for them, the wheels, having been set up under this agreement, could not be claimed and held by the mortgagee.

If this position were tenable, it would follow that the mortgagor could convey to another a right in the mortgaged premises greater than he could exercise himself. But it is well settled that, although the mortgagor, for some purposes, and as to all persons except the mortgagee, may be regarded as the absolute owner of the land, yet the title of the mortgagee is in all respects to be treated as paramount. The mortgagor cannot make a lease which will be valid against the mortgagee; and if the mortgagee enter, neither the mortgagor nor his lessee will be entitled to emblements. *Pow. Mortg. c. 7*; *Keech v. Hall*, 1 Doug. 21; *Lane v. King*, 8 Wend. 584; *Mayo v. Fletcher*, 14 Pick. 525. And we think it is not in the power of the mortgagor, by any agreement made with a third person after the execution of the mortgage, to give to such person the right to hold anything to be attached to the freehold, which as between mortgagor and mortgagee would become a part of the realty. The entry of the mortgagee would entitle him to the full enjoyment of the premises, with all the additions and improvements made by the mortgagor or by his authority.

Whether a person putting a building upon land by license of the mortgagor, under such circumstances that it would remain his personal property as against the mortgagor, would be allowed in equity to maintain a bill to redeem, if the mortgagee should enter, is a question involving very different considerations. A tenant under a lease may redeem, to protect his interest. *Rev. Sts. c. 107, § 13*; *Bacon v. Bowdoin*, 22 Pick. 401.

It has been suggested that the defendants cannot avail themselves of their title as mortgagees, because they acquired the title of the mortgagor also, and therefore the mortgages are to be regarded as paid or merged. But it has been often decided that the purchaser of an equity of redemption may take an assignment of the mortgage, and may keep

the legal and equitable titles distinct, at his election, if he has any interest in so doing, so that they shall not merge by unity of possession. And a release of an equity of redemption operates as an extinguishment of the equity of redemption, and not as a merger of the estate conveyed by the mortgage. *Loud v. Lane*, 8 Met. 517.

*Exceptions overruled.*¹

DAVENPORT *v.* SHANTS.

SUPREME COURT OF VERMONT. 1871.

[*Reported 43 Vt. 546.*]

PETITION for foreclosure of a mortgage. The petition sets forth a mortgage, executed by John G. Shants & Co., to the petitioner, October 13th, 1866, of a mill and factory and tannery in Searsburg, with 200 acres of land, and three dwelling-houses thereon. "And also the factory, then in process of erection on the site of said Searsburg tannery, with the saw-mill, water-wheels, and all the machinery and shafting in said factory," to secure a note of \$1,000. The petition then sets forth the execution by Shants & Co., and the purchase by the petitioner, of another mortgage on the same premises, except the machinery, and also sets forth that the defendants, other than Shants & Co., claim an interest in said property.

The petition was taken as confessed by all the defendants, except Henry G. Root, who appeared and answered, admitting the facts set forth in the petition, or not denying them, except as follows:—

"That between the 3d day of August and the 27th day of October, 1866, this defendant, by his agent, Olin Scott, sold to the said John G. Shants & Co., various articles of machinery, consisting of a circular saw-mill and saw, and the belts to drive the same; the gears on two water-wheels; the upper piece of a large water-wheel shaft and box to the same; the counter-shafts to two water-wheels; the drum flanges and boxes to the said counter-shafts; and one extra saw collar; upon the condition that said machinery should be and remain the property of this defendant until the same should be paid for by said John G. Shants & Co., the whole of said machinery amounting in value to the sum of \$919.86, which they agreed to pay this defendant for the same. All of which machinery, excepting the gears and upper shaft to the large water-wheel, and the counter-shaft and boxes to the same, were in place in the factory mentioned in said petition at the time of the alleged execution of the mortgages set forth in said petition, and the said excepted articles have, since said time, been placed in said factory. That there

¹ See *Tift v. Horton*, 53 N. Y. 377; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Meagher v. Hayes*, 152 Mass. 228; *Porter v. Pittsburg Steel Co.*, 122 U. S. 267; *Cunningham v. Cureton*, 96 Ga. 489; *Evans v. Kister*, 92 Fed. R. 828, 836.

has been paid to this defendant, towards the purchase of said machinery, the sum of \$191 only; the remainder being still due, with the interest thereon.

“And this defendant claims and insists that his title to said machinery is paramount to that of the said John G. Shants & Co., and to that of the petitioner, and that the petitioner has no right to a foreclosure as to said machinery, or any part thereof, against the defendant.

“The petitioner replied, saying, that he never at any time, until long after the execution of the several mortgages sought to be foreclosed by this petition, had any knowledge or notice actual or constructive of any contract or understanding between the defendant and the said John G. Shants & Co., by which the defendant had or claimed to have any right or claim to the saw-mill, water-wheels, and the machinery and shafting in the factory described in said mortgage; that he did, on the 13th day of October, 1866, in good faith, and relying upon the fact that no claims, liens or incumbrances existed of record upon any of the property or estate described in said mortgage, and upon the promise and assurance of both the members of said firm of John G. Shants & Co., that none existed in fact, loan to said firm, the full sum of one thousand dollars, and took said mortgage in good faith to secure the payment thereof; that if it is true that the defendant did reserve such a lien upon the several articles named in his answer to said petition for foreclosure, as is in said answer stated, yet it is also true that the defendant well knew the purpose for which John G. Shants & Co. purchased the same, and the defendant then and afterwards consented that they might attach and annex said water-wheels, saw-mill, shafting and machinery to their freehold, and make the same a part of and appurtenant to said freehold, and did by his agents and workmen assist the said John G. Shants & Co. in so doing. And insists that the lien created by his said mortgage is paramount to any lien or claim of the defendant to the saw-mill, water-wheels, machinery and shafting in said factory.

“*Stipulation.* — It is hereby stipulated that this cause shall stand for hearing upon petition, answer, replication, affidavits of Olin Scott and H. W. Scott, statement of facts, and notes and mortgages set forth in the petition. The facts stated in the answer are admitted to be true, excepting as varied or qualified by the replication in connection with the affidavits and statement of facts. The facts stated in the replication are admitted to be true, excepting as varied or qualified by the affidavits and statement of facts, and excepting that the averment respecting annexing ‘to the freehold of the said John G. Shants & Co., and make the same a part of, and appurtenant to said freehold,’ is not to be taken as an averment of facts, but as a conclusion of law. The facts stated in the affidavits and statement are admitted to be true.

“*Affidavits.* — Olin Scott, on oath, says: ‘I was at the mill of John G. Schants & Co., in Searsburgh, in the fall or winter of 1866–7, for the purpose of getting pay for the job which I had done for them on account

of H. G. Root, and looking around, I found that said John G. Schants & Co. had built a wooden wheel which did not answer their purpose, and they were altering it. Without taking off my overcoat or gloves, I suggested something about cutting or enlarging a spout hole in the flume, and nothing more, and charged nothing for my advice. I never had anything to do with putting in the machinery which I furnished said Schants & Co., on account of said Root, and none of said Root's hands, so far as I know, had anything to do with putting said machinery into the mill of said Schants & Co.'

"Henry W. Scott, on oath, says: 'In 1866, I furnished an iron wheel for John G. Schants & Co., and set it in place in the mill of said Schants & Co., in Searsburgh, working at it myself. I did not in any way assist in putting in the machinery furnished said Schants & Co. by Henry G. Root; the machinery furnished by said Root was not delivered at said mill until after I had finished my job and had set said iron wheel. I had no interest in said Root's job, and he had none in mine.'

"*Statement of Facts.*—At the time the mortgage was executed, there was in Shants' factory a flume, with a water-wheel attached outside of the flume, which water-wheel was a wooden centre-vent wheel, with wooden vertical shaft, having cast-iron gudgeons and a bevel-gear attached. The bevel-gear on said water-wheel drove another bevel-gear on the counter-shaft. This counter-shaft had a pair of flanges attached, upon which flanges a wooden pulley was built, which pulley drove the saw-mill. The gudgeons, gears, shaft-boxes to same, and flanges were furnished by H. G. Root and are now claimed by him. Within the flume aforesaid was an iron turbine water-wheel which was furnished and put in place by H. W. Scott, and which had a short shaft. There was also in the factory at the time aforesaid a circular saw-mill, with carriage and all fixtures to the same; also a 48-inch circular saw, together with all the necessary belts to drive the saw-mill. The whole was in running order, the saw-mill being driven by the wooden centre-vent water-wheel first named. The saw-mill, carriage, and fixtures, and the saw and belts were furnished by the said Root, and are now claimed by him. There were on the yard at the same time two bevel-gears, one piece cast-iron water-wheel shaft, with boxes, one counter-shaft, with boxes and flanges. The last-named iron work was all furnished by the said Root and are claimed by him. The last-named machinery was afterwards put into the factory by coupling the cast-iron shaft to the iron turbine water-wheel shaft and attaching to the aforesaid cast-iron shaft the gears and counter-shaft, with the flanges and boxes belonging to the same, and were built for that purpose. The turbine water-wheel and shaft are in the lower wheel-pit. The shaft coupled to the water-wheel, with the gears, counter-shaft, boxes and flanges, are in the basement-room over the wheel-pit and under the principal floor, on which floor the saw-mill is placed. The upper end of the shaft, which is coupled to the water-wheel, and the counter-shaft

are supported and attached to a frame-work by bolts, which frame-work is attached to the basement floor-timbers, and to the floor-timbers of the floor above by means of tenons, mortises and keys. The wooden water-wheel has a wooden shaft extending from the wheel-pit up into the basement room, where the gear is attached, and has gearing and counter-shaft, attached in the manner similar to the first-named counter-shaft, and supported in a similar manner. The saw-mill machinery, consisting of saw-arbor and boxes, with saw, the feed-works, gig-works, log-rolls and fixtures, are all attached to a wooden frame, which frame, with all the machinery attached, is set on floor-timbers and fastened by means of two bolts, extending through the floor-timbers and frame aforesaid. The carriage to the saw-mill runs upon small iron rollers, which rest upon small iron chairs, which chairs are secured to a stick of timber that is laid down on the floor-timbers for that purpose. The chairs are screwed down with wood-screws. The rollers are not attached to the chairs, but rest on them. All the machinery mentioned above, including the water-wheels and appendages, were placed in the factory, which is a large two-story building, 33 x 90 feet, by John G. Shants & Co., for the purpose of prosecuting the business of manufacturing lumber, chair stock, &c., and is connected with and attached to the building, as machinery of that character usually is. So much of the property herein described as was furnished by H. W. Scott is not in controversy in this suit."

At the September term, 1868, decree, *pro forma*, foreclosing mortgage against all defendants, except Henry G. Root, and dismissing the petition as to Root, with costs. Appeal by petitioner.

H. H. Wheeler and Charles N. Davenport, for the petitioner.

———, for the defendant.

PECK, J. The bill having been taken as confessed as to all the defendants except Henry G. Root, and he alone defending, the only question is as to the right of the orator, under his mortgage from Shants & Co., to that portion of the property sold conditionally by Root to the said mortgagors.

The bill, and answer of Root, in connection with the written stipulation of the parties on file, leave no dispute as to the material facts in the case, and no time need be spent in repeating the facts thus agreed.

It must be regarded as settled as a general rule in this State, that a party may sell and deliver personal property, under a condition that it shall remain the property of the vendor until the price is paid; and that under such contract, the title will remain in the vendor until the condition is complied with, both as between the vendor and such conditional vendee, and also as between the original vendor and a *bona fide* purchaser without notice from such conditional vendee. The only question is whether the facts of this case take it out of the general rule.

The proposition of the counsel of the defendant Root is, that the whole property sold conditionally by Root to Shants & Co. was personal property as well after as before the sale, and cannot properly be claimed

as fixtures or as parts of the realty. But we think as between mortgagor and mortgagee, if the title of the mortgagor were absolute, the defendant's proposition is not correct; and that under the recent decisions in this State, on being put in place in the mill and factory, as shown in this case, it became so far annexed to the realty as to pass under a mortgage of the real estate. But still the question remains as between the mortgagee under his mortgage, and the original owner under his conditional sale to the mortgagor, which has the paramount right.

First, as to that portion of the property which had been put in place in the mill and factory by the mortgagors after they thus purchased it of Root, and which was in the building and thus annexed at the time the orator took his mortgage. As to this property, the orator, as it appears having advanced his money and taken his mortgage in good faith, without notice of any lien or encumbrance upon it, and from its condition, having reason to suppose that the mortgagors' title to this property in question was the same as his title to the realty, to which it was annexed, and of which it was apparently parcel, seems to have a strong equity in his favor. While on the other hand the defendant Root, the unpaid vendor, who endeavored to secure himself, by stipulation in the sale that he should hold the title till paid, ought not to be deprived of this security without some substantial reason. But the defendant Root must have understood, when he sold the property to Shants & Co., that they intended to put the property to use in advance of the payment of the price; and from the kind and nature of the property, he must have expected that in its use it necessarily must be annexed to the realty, substantially in the manner in which it was, and thereby become apparently parcel of the realty. What he knew or had reason to suppose and did suppose was to be done with the property, he must be taken to have consented to, as he did not object. Root therefore having, by implication at least, if not expressly, consented that the property might be incorporated with the realty of Shants & Co. in the manner it was, and they thereby become clothed with the apparent title as incident to their record title to the real estate, whereby the mortgagee was misled and induced to part with his money on the credit of the property, the equity of the mortgagee is paramount to that of the conditional vendor. Justice and equity, as well as sound policy, require this limit to the rights of a conditional vendor as between him and an innocent purchaser or mortgagee of real estate without notice, who advances his money on the faith of a perfect title.

But as to that portion of the property mentioned in the answer of the defendant Root, and in the agreed statement of facts on file, which had not been placed in the mill or factory at the time of the execution of the mortgage to the orator, but was in the yard and put in place in the factory or mill afterwards, the right of the defendant Root is paramount to the right of the orator. That, not having been annexed to the realty at the date of the mortgage, would not pass as incident to the realty;

and the mortgage did not divest Root of his title. It having been placed in the building by the mortgagors after the execution of the mortgage, the mortgagee might hold it as against them, but not as against Root, the conditional vendor. As to this portion of the property the mortgagee was not misled, and advanced nothing on the faith of it.

The decree of the Court of Chancery is reversed, and cause remanded for a decree of foreclosure for orator against all the defendants as to all the property except that defendant Root have a right to that portion of the property, or the value thereof, not in place in the factory or mill at the time of the execution of the mortgage to the orator, but put in afterwards, — the orator having his election to pay to Root the value of it, or have it excepted in the decree so far as Root is concerned, with liberty to Root to remove it within such reasonable time as the Court of Chancery shall fix for that purpose.

STILLMAN v. FLENNIKEN.

SUPREME COURT OF IOWA. 1882.

[Reported 58 Iowa, 450.]

THIS is an action of replevin for a smutter of the alleged value of seventy-five dollars. The cause was tried to the court, and judgment was rendered for the defendant. The plaintiff appeals. The facts are stated in the opinion.

D. W. Clements and *W. E. Fuller*, for appellant.

Ainsworth and *Hobson*, for appellee.

DAY, J. The court found the facts of the case to be as follows:

“1st. That in the year 1877 Anderson and Stillman were the owners of the smutter in controversy in this case,

“2d. That at the time Patterson and Dykens were the owners of, or interested in, the East Auburn Mills.

“3d. That Anderson and Stillman loaned the smutter in question to Patterson and Dykens, the said Patterson and Dykens to pay for the use thereof, what would be equal to ten per cent per annum, on the cost of said smutter.

“4th. That said smutter was to be returned, but no time agreed upon for such return.

“5th. That said smutter was placed in the East Auburn Mill, by Patterson and Dykens, in the manner that such smutters are usually placed in mills, it being placed upon a platform about two and one half feet square, and something more than three feet in height, the platform not being nailed or cleated to the floor of the mill, but the smutter being held in position by braces from the joists of the mill above, and extending to the smutter, holding it firmly in place for use.

"6th. The smutter in question, when placed in the mill, was designed for, and used only for buckwheat and rye.

"7th. That there was another smutter in the mill, which had, previous to getting the one in question, been used for all purposes for which a smutter was used in the mill.

"8th. That about the time of obtaining the smutter in question, the arrangement of the mill was changed, and the first smutter so placed in the mill, as not to be available for use in grinding buckwheat and rye, and the smutter in question procured for use in grinding that class of grain.

"9th. That said smutter was placed in the mill in December, 1877.

"10th. That the power of said mill was water, and that for the purpose of operating the smutter in question, a counter-shaft was placed in said mill, running from the main or upright shaft over the smutter and connected therewith by belts, by which the smutter was operated.

"11th. That to remove the smutter it was not necessary to destroy or injure the mill, that is, the building, farther than to remove in part some spouting, or leaders, in which the grain or flour of the mill was conducted.

"12th. That on the 28th day of January, 1879, the sheriff of Fayette County, Iowa, by virtue of a special execution to him directed, sold to Flenniken Brothers the land on which the mill in question is situated, including the mill, machinery and fixtures therein.

"13th. That on the 30th day of January, 1880, the sheriff of said county of Fayette made his deed of said premises, mill, machinery and fixtures, to Flenniken Brothers, who took possession thereof by virtue of said deed.

"14th. That R. B. Flenniken is the defendant herein, and was a member of Flenniken Brothers, and that he is now the sole owner of the interest of said Flenniken Brothers.

"15th. That at the time of the sale, January 28th, 1879, the said Flenniken Brothers had no notice that the smutter in question was owned by plaintiff, or Anderson and Stillman.

"16th. The plaintiff is now owner of whatever interest Anderson and Stillman has owned, or would have in said smutter. By the foregoing, I mean that the interest of Anderson in said smutter is conveyed to the plaintiff.

"17th. That when Patterson and Dykens placed the smutter in question in the mill, it was with the intention that it should be removed and returned to Anderson and Stillman.

"18th. I find the value of the smutter to be \$75.

"19th. That when the smutter was loaned, Patterson [Anderson] and Stillman knew that it was to be placed in the mill as a part of the machinery thereof."

As conclusions of law the court found:—

"1st. That as between other parties and purchasers, at a judicial sale, without notice, the smutter was a part of the realty and passed as such.

"2d. That R. B. Flenniken is the full and unqualified owner of the smutter in question, and entitled to the possession thereof." The amount in controversy not exceeding one hundred dollars, the trial judge duly certified the questions of law upon which it is desirable to have the opinion of this court, all of which may be resolved into the single question, whether under the facts as found by the court, the smutter passed to Flenniken Brothers by virtue of their purchase at the sheriff's sale.

That as between Anderson and Stillman, and Patterson and Dykens, the smutter in question did not become a part of the realty, but was subject to removal, must be admitted. The question involved in this case is as to what character is to be impressed upon the smutter against a purchaser at sheriff's sale, without any notice of the arrangement existing between Anderson and Stillman, and Patterson and Dykens. In *Quinby v. Manhattan Cloth & Paper Co.*, 9 C. E. Green, 260 (264), it is said: "The true criterion as to fixtures to determine whether they are to be regarded as part of the realty or not, is not whether they may be detached and removed from the premises without injury to the freehold, although that, as is well understood, is oftentimes an important element in deciding the question. It is well established that whether property, which is ordinarily treated as personal, becomes annexed to and goes with the realty as fixtures, or otherwise must depend upon the particular circumstances of the case." It appears from the facts as found by the court that the smutter was placed in the mill in the usual manner, and that without it the mill, without change in its arrangement, could not grind buckwheat and rye. It was then, to all appearances, an essential and necessary part of the mill.

In *Gray v. Holdship*, 17 S. & R. 413, the court say: "From the adjudged cases on this subject, I think we are warranted in saying that everything put into and forming part of a building, or machinery for manufacturing purposes, and essential to the manufactory, is part of the freehold; the wheels of a mill, the stones and even the bolting cloth, are parts of the mill and of the freehold, and cannot be levied upon as personal property." In *Farrar v. Stackpole*, 6 Greenleaf, 154, it was held that things personal in their nature, but fitted and prepared to be used with real estate, and essential to its beneficial enjoyment, being on the land at the time of its conveyance by deed, pass with the realty, and that, by the conveyance of a saw-mill with the appurtenances, the mill chain, dogs and bars, being in their appropriate places at the time of the conveyance, passed to the grantee. In *Farris v. Walker*, 1 Bailey (S. C.), 540, it was held that a cotton gin attached to the gears in the gin house, on a cotton plantation, passed by a conveyance of the land. See, also, *Union Bank v. Emerson*, 15 Mass. 152; *Fryat & Campbell v. The Sullivan Co.*, 5 Hill, 116; *Bringholff v. Munzenmaier*, 20 Iowa, 513; *Ottumwa Woollen Mill Co. v. Hawley*, 44 Iowa, 57; *Miller v. Plumb*, 6 Cowen, 665; *Wadleigh v. Janvrin*, 41 N. H. 503; *Powell v. Monson & Brimford Man'g*

Co., 3 Mason, 459; *Corliss v. McLagin*, 29 Me. 115; *Trull v. Fuller*, 28 Me. 545.

The rule is the same whether the sale is by the owner or by a public officer under the law. *Price v. Brayton*, 19 Iowa, 309; *Farrar v. Chariffetete*, 5 Denio, 527.

Without entering upon the hopeless task of citing and reconciling all the decisions upon this very vexed question of fixtures, we are clearly of opinion that under the facts found by the court in this case, the smutter must, as to a purchaser without notice, be regarded as constituting a part of the realty. *Affirmed.*¹

CAMPBELL v. RODDY.

COURT OF ERRORS OF NEW JERSEY. 1888.

[Reported 44 N. J. Eq. 244.]

ON appeal from a decree advised by Vice-Chancellor Bird, whose opinion is reported in *Roddy v. Brick*, 15 Stew. Eq. 218.

Mr. J. D. Bedle, for appellants.

Mr. A. V. Schenck, for respondents.

The opinion of the court was delivered by

REED, J.² The facts, then, present the bare question: What is the position of a mortgagee of real estate into which mortgaged chattels have become incorporated by the act of the mortgagor, subsequent to the execution of the real estate mortgage?

The elementary rule of the common law was *quicquid plantatur solo solo cedit*. It may be stated, as a rule of great antiquity, that whatever is affixed to the soil becomes, in contemplation of law, a part of it, and is, consequently, subjected to the same rights of property as the soil itself. Broom's Maxims, 268. But many exceptions have become engrafted upon this rule.

"The law of fixtures," says Kent, "is in derogation of the original rule of common law which subjected everything affixed to the freehold to the law governing the freehold, and it has grown into a system of judicial legislation, so as almost to render the right of removal of fixtures a general rule instead of being an exception." 2 Kent's Com. 343.

The question whether property is or is not a fixture arises most frequently between the tenant of a particular estate and those in reversion or remainder. As between these parties it is held, by a well-settled line of cases, that the intention of the tenant making the annexation is one of the three tests to be resorted to in ascertaining

¹ *Contra*, see *Hill v. Sewald*, 53 Pa. 271; *Hendy v. Dinkerhoff*, 57 Cal. 3.

² A part of the opinion is omitted.

the nature of the property. It is equally well settled that, in instances aside from those, the mental attitude of the person making the annexation cannot modify the legal effect resulting from an incorporation into the realty of that which was personal property. Thus a structure erected on the land of another will become the property of the owner of the land, although built with a view of enforcing an adverse right in the land. *Sudbury v. Jones*, 8 Cush. 184; *Lee v. Risdon*, 7 Taunt. 188; *Wilde v. Waters*, 16 C. B. 637; *Overton v. Williston*, 31 Pa. St. 155.

An intent existing alone in the mind of him who makes the annexation, however, differs from another feature, which is recognized in the cases as preserving the personal character of the property annexed. That feature consists in the existence of a mutual agreement, express or implied, between the owner of the real estate and the chattels, in respect to the manner in which chattels shall be regarded after their annexation. Such an agreement seems to be entirely efficacious in preserving the personal character of the annexed chattels as between the parties thereto. *Pope v. Skinkle*, 16 Vr. 39; *Harlan v. Harlan*, 28 Pa. St. 303; *Ewell on Fix*. 66.

This rule, which seems simple enough when applied to a cause arising between the respective real and chattel owners, becomes more difficult of application when the rights of persons other than these owners are involved. The additional question then arises, how far such an agreement between these parties can affect purchasers, mortgagees, or judgment creditors of the owner of the real estate on the one hand, or of the chattels on the other hand. The courts of New York have accorded to an agreement between the owner of land and one owning or having an interest in annexed chattels, very great efficacy. Those courts hold that such an agreement is valid, not only against a prior mortgagee of the land, but also against a subsequent mortgagee or purchaser without notice. In the case of *Tift v. Horton*, 53 N. Y. 377, it was held that neither a precedent nor a subsequent mortgagee of real estate can claim property which has been annexed to the mortgaged premises under an agreement between the owner of the fee and the owner of the chattels, to the effect that the latter shall remain personalty. In *Ford v. Cobb*, 20 N. Y. 344, it was held that a duly filed chattel mortgage upon iron salt-kettles and an iron arch-piece preserved their character as chattels even against the subsequent purchaser of the land, to which land the owner had annexed the chattels. So the rule in New York seems settled that such an agreement will affect not only the parties to it, but all prior and subsequent interests in the realty.

The supreme court of Massachusetts has taken a different view of the force of such an agreement. In *Pierce v. George*, 108 Mass. 78, a chattel mortgage was given on machinery which the mortgagee knew was to be annexed to real property, and after it had been annexed, a mortgage was given on the realty, and it was held that the real estate mortgagee could hold the machines as a part thereof. In the case of

Hunt v. Bay State Iron Co., 97 Mass. 279, a question arose in respect to the effect of such an agreement between the owner of iron rails and a railroad company which purchased them. The query was whether the agreement would preserve the character of the rails as chattels, after they had been affixed to the road-bed, as against a previous mortgagee of the road or a subsequent purchaser without notice. It was held that the agreement to which they were not parties could affect neither purchasers nor prior mortgagees, and, as to them, the rails became real estate. So, in the supreme court of Iowa, in *Stillman v. Flenniken*, 58 Iowa, 450, it was held that such an agreement would not affect the rights of a purchaser of real estate at a judicial sale. It may be remarked that the New York cases seem to be in confusion as to whether the existence of a chattel mortgage upon the personalty at the time of the annexation by the mortgagor amounts to an agreement that the chattel shall remain such. The case of *Voorhees v. McGinnis*, 48 N. Y. 278, holding that it did not amount to an agreement, is apparently recognized in *Tift v. Horton*, *supra*, and left in doubt in the last case of *Sisson v. Hibbard*, 75 N. Y. 542. I do not regard this question as material in the present cause, from the standpoint whence I view it, nor do I think it essential to follow the doctrine of those cases which give to the agreement the greatest force in preserving the chattel character of the property, or of those cases which concede to the act of annexation the greatest force in transforming the chattels into realty. Whether the chattel mortgage in the present cause was registered or unregistered, it, as between the parties thereto, created a lien in favor of the mortgagee upon the engines and machinery mortgaged. The interest of the mortgagee of the chattels as well as that of the prior mortgagee of the real estate, under the doctrine respecting mortgages, both real and personal, which obtains in this State, were mere securities. *Woodside v. Adams*, 11 Vr. 417.

The inquiry naturally arises how far this lien of the chattel mortgagee can be preserved after the annexation.

It will be observed that the question now presented differs radically from that which would have arisen, had the real estate mortgage been executed subsequent to the annexation of the chattels. As between a lienor who consents to have the subject-matter of his lien transmuted into a shape by which subsequent purchasers and mortgagees are liable to be subjected to deceptive dealings, there seems to be no equitable ground upon which the lien should be recognized against an innocent subsequent mortgagee or purchaser for value. The entire spirit of our registry acts is opposed to the notion that, in such a juncture of affairs, the real estate purchaser would not be regarded as a *bona fide* purchaser against whom the chattel mortgage would be void. But, as already observed, the real estate mortgagees, in the present case, held their lien before the attachment to the realty of the mortgaged chattels. It is true that by force of the annexation they would become subjected to the lien of the real estate mortgage absolutely, unless the lien of the

chattel mortgagee intervenes. Any property belonging to the mortgagor, which he chooses to annex to the mortgaged premises, becomes realty. But it is difficult to perceive any equitable ground upon which the property of another, which the mortgagor annexes to the mortgaged premises, should inure to the benefit of a prior mortgagee of the realty. The real estate mortgagee had no assurance at the time he took his mortgage that there would be any accession to the mortgaged property. He may have believed that there would be such an accession, but he obtained no right, by the terms of his mortgage, to a lien upon anything but the property as it was conditioned at the time of its execution. He could not compel the mortgagor to add anything to it. So long therefore as he is secured the full amount of the indemnity which he took, he has no ground for complaint. There is therefore no inequity towards the prior real estate mortgagee, and there is equity toward the mortgagee of the chattels, in protecting the lien of the latter to its full extent so far as it will not diminish the original security of the former. As already remarked, the real estate mortgagee is entitled to any annexation made by his mortgagor of his own property, but is not entitled to the property of others. The property of the mortgagor in these chattels, when he made the annexation, was an equity of redemption. So far as this interest had a value it became subjected to the lien of the prior real estate mortgagee, but the value of his interest was the value of the property subjected to the lien.

The supreme court of the United States has enunciated a rule which I regard as analogous to the one now propounded. It is in respect to the acquisition of property by a railroad company which has already given a mortgage upon its road and franchises and upon future acquired property. The doctrine announced is, that the mortgage attaches itself to the property in the condition in which it comes to the mortgagor's hands. In the language of Justice Bradley, in the case of *United States v. New Orleans R. R. Co.*, 12 Wall. 362, it only attaches to such interest as the mortgagor acquires, and if he purchase property and give a mortgage for the purchase-money the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage or judgment or recognizance, can displace such mortgage for purchase-money. This rule was followed in *Fosdick v. Schall*, 99 U. S. 235. It is true that, in the opinions in these cases, there is a statement that the rule would be different if the articles upon which the lien existed became incorporated into the road itself. Instances may be imagined where the exception so indicated would be proper. Where the articles are of such a character that their detachment would involve the dismantling of an important feature of the realty, their annexation might well be regarded as an abandonment of the lien by him who impliedly assented to the annexation. Shingles, lumber, brick to be used in a building, railroad iron or ties to be used in constructing a railroad, are apparent samples of such a class of chattels.

I am not prepared to say, however, that even in such instances there may not be an equitable method of awarding to a prior mortgagee of the realty all his rights, while preserving in some degree the interest of the lienor of the chattels. For, in my view, the equitable way of dealing with the property is, to preserve the right of the prior real estate mortgagee to the same degree of security which he would have enjoyed had the property remained as when mortgaged. The preservation of that right in its full measure would, in some instances, be entirely inconsistent with the recognition of any remaining adverse right in an indistinguishable portion of the realty. The question involves merely the practical application of equitable principles to the diverse interests. I regard the case above cited as relevant, because I see no greater legal difficulty in preserving the lien upon property which would otherwise become subjected absolutely to the lien of a prior real estate mortgage by way of accretion or estoppel, than if it became subject to such mortgage by an express agreement that the mortgage should cover after-acquired property.

In the practical application of the equitable rule that the lien on the chattels must give way to the previous lien upon the real property in the degree already indicated, there is no difficulty where the annexed chattels, as in the present case, are a distinguishable and separable part of the realty. If the detachment of the articles so annexed will occasion no damage to the realty, then the lien upon them can be enforced in the same degree as if they had remained chattels. If the detachment would occasion some diminution in the value of the freehold, as it would have stood had the attachment not been made, then the depreciation must first be made whole to the real estate mortgagee before the right of the chattel mortgagee can be recognized. So far as appears, in the present case there can be no appreciable injury to the realty occasioned by the removal of the engines and chattels.

It is perceived that the view above indicated does not rest upon an agreement which preserves the chattel nature of the engines. It rests upon an equitable preservation of the lien upon chattels after they are transmuted into realty. The limitation upon the otherwise legal effect of the annexation, is merely to this extent. The mortgagor's interest in the chattels is not relieved from the legal result arising from the annexation. If an engine worth \$10,000 is attached by the mortgagor of land so as to become a part of the land, I see no reason why it should retain its character as personalty because there happens to be a previous chattel mortgage upon it for \$500. The equity of redemption is covered by the prior real estate mortgage.

This view may lead to an inquiry, when the occasion arises, whether such annexation will cause a modification of the legal remedy of the chattel mortgagee. It may also, where, as in this case, only a part of the chattels covered by one chattel mortgage are annexed, call for a marshalling of securities for the purpose of ascertaining whether the portion annexed is still liable for any or what portion of the sum still

due upon the chattel mortgage. When, however, as seems to be probable in this case, the totality of the mortgaged chattels will be needed to answer the claims secured, the application of the rule is simple.

The conclusion is that the decree below should be reversed, and the cause remitted to the court of chancery. If it there appears that the equity of redemption in the chattels is valueless, that court can exclude them from the sale under the foreclosure decree. If it appears that there is some valuable interest in the equity of redemption, the court can then either confine the sale to that interest so far as the sale concerns these chattels, or can order them to be sold absolutely and leave the rights which the parties have in them to be adjusted in making a disposition of the money arising from the sale.¹

TYSON v. POST.

COURT OF APPEALS OF NEW YORK. 1888.

[Reported 108 N. Y. 217.]

APPEALS from orders of the General Term of the Supreme Court in the second judicial department, made May 14, 1885, which reversed judgments in favor of plaintiffs, entered upon decisions of the court on trial at Special Term.

These actions were brought to foreclose two purchase-money mortgages executed by defendant Cooney upon certain premises situate in Queens County.

There was attached to the premises at the time of the sale and conveyance by the mortgagees and the execution of the mortgage the plant and machinery of two marine railways, the use of which had been abandoned. The controversy was as to these fixtures, of which defendant Post claimed to be the owner. The negotiations for the purchase were between plaintiffs and one Carroll, the conveyance was made to Cooney as the nominee of Carroll. Defendant Post claimed that he advanced the money to complete the cash payment required by the contract of purchase under the understanding and oral agreement of all the parties that he should have the title to said plant and machinery and the right to remove them at any time from the premises.

Further facts appear in the opinion.

C. Elliott Minor for appellants.

Prescott Hall Butler, for respondent.

ANDREWS, J. The question whether the defendant Post acquired title to the plant and machinery of the marine railways embraced in the

¹ *German Savgs. & Loan Soc. v. Weber*, 16 Wash. 95; *Hurxthal's Ex'x v. Hurxthal's Heirs*, 45 W. Va. 584; *Northwestern Mut. Life Ins. Co. v. George*, 77 Minn. 319, acc. See *Binkley v. Forkner*, 117 Ind. 176.

plaintiffs' mortgage, as security for the \$6,200 paid by him to the plaintiffs at the request of Carroll, to enable the latter to complete the first payment on the contract with the plaintiffs for the purchase of the land, does not depend upon the character of the property, whether real or personal, when placed upon the mortgaged premises. There can be little doubt, however, that the machinery, shafting, rollers and other articles became as between vendor and vendee, and mortgagor and mortgagee, fixtures and a part of the realty. (*McRae v. Central Nat. B'k*, 66 N. Y. 489.) But, as by agreement, for the purpose of protecting the rights of vendors of personalty, or of creditors, chattels may retain their character as chattels, notwithstanding their annexation to the land in such a way as in the absence of an agreement would constitute them fixtures (*Ford v. Cobb*, 20 N. Y. 344; *Sisson v. Hibbard*, 75 id. 542), so, also, it would seem to follow, that by convention, the owner of land may reimpres the character of personalty on chattels, which, by annexation to the land, have become fixtures according to the ordinary rule of law, provided only that they have not been so incorporated as to lose their identity and the reconversion does not interfere with the rights of creditors or third persons. The plant and machinery in question were personal property when placed on the land, and the only issue presented is, did the plaintiffs agree with Post that he might take the title to the plant and machinery for his security, free of the mortgage, and remove them at any time from the mortgaged premises, thereby reimpresing the property with the character of personalty. In determining this question it does not seem to us to be very material to inquire whether the deed from the plaintiffs to Cooney (the nominee of Carroll), and the mortgage back embraced, or was intended to embrace, the plant and machinery. Post was not a party to the instruments and is not concluded by them. The rights of Post depend wholly upon his agreement with the plaintiffs, and if they received his money upon the agreement that he should have the plant and machinery, with the right to remove them without restriction as to time, the agreement was valid although by parol, and even if it contradicts the legal import of the mortgage, it being an agreement between different parties, it is not within the rule which forbids parol evidence to contradict a written instrument. The only point of disagreement between the parties relates to a restriction alleged to have been placed on the time within which Post should exercise the right of removal. The plaintiffs concede that the right of removal was given to Post, but they allege that it was subject to the limitation that the right should be exercised before any proceedings were taken to foreclose the mortgage. The defendant on the other hand claims that the right was unrestricted and absolute. The paper executed by the plaintiffs on the closing of the transaction contains the restriction claimed by the plaintiffs. But we think the evidence sustains the contention of the defendant, that the paper was not delivered to or accepted by him, and that he had no knowledge of

its contents. The question of fact, therefore, depends upon the other evidence bearing upon the actual agreement. It would not be useful to state the evidence in detail. It is sufficient to say that after a careful examination of the testimony, we have reached the conclusion that the claim of the defendant is most consistent with the conceded facts and is supported by a preponderance of evidence.

The orders of the General Term should, therefore, be affirmed, and judgments absolute directed in accordance with the stipulations.

All concur.

*Judgments accordingly.*¹

HOBSON v. GORRINGE.

COURT OF APPEAL. 1896.

[*Reported* [1897] 1 *Ch.* 182.]

THIS was an appeal from a decision of Kekewich J. upon a motion to restrain the defendant from selling or disposing of to any person other than the plaintiff an 11-horse-power Stockport gas engine, erected at the South Coast Steam Saw Mills, Worthing, lately in the occupation of J. G. King, the hirer of the engine from the plaintiff. The defendant claimed as mortgagee of the saw mills to be entitled to the engine as a fixture. On the hearing of the motion, it appearing that negotiations were pending for the sale of the mortgaged premises, a sum of 55*l.* was deposited by agreement in the joint names of the plaintiff's and defendant's solicitors, as representing the value of the engine, to abide the result of the motion, which was to be treated as the trial of the action. Kekewich J. decided that the defendant was entitled to the money. The plaintiff appealed.

The facts were as follows : —

By a contract in writing dated January 7, 1895, Hobson, thereafter called the owner, let to King, a builder, thereafter called the hirer, the gas engine in question upon what is known as the hire and purchase system for the purpose of being fixed upon King's land at Worthing, of which King was the owner in fee, and on which a saw mill had been erected. By clause 3 the hirer agreed to pay the owner for the hire and use of the gas engine the sum of 18*l.* before delivery, and the sum of 3*l.* 10*s.* per month after delivery for a period of ten months. Clause 4 provided that if, during the continuance of the hiring, the hirer failed to pay the hire or any part thereof the agreement should forthwith determine, and the owner should be at liberty to repossess himself of and to remove the gas engine, and the hirer should have no claim whatever against the owner, either for money he had paid for the use of the gas engine or for any damage sustained by reason of the retaking thereof. By clause 6 the owner agreed that at

¹ See *McFadden v. Allen*, 134 N. Y. 489.

the expiration of ten months, if the hirer should in all things have performed his part of the agreement, the rent or hire named in clause 3 should cease, and the gas engine should become the absolute property of the hirer on the further payment of 3*l*. Clause 7 provided that the agreement should not be construed to operate in any way as a contract for the sale of the gas engine, but only as an arrangement for the hire thereof, and unless and until the hiring terminated under the provisions of clause 6 the hirer should have no right or property in the gas engine at law or in equity save as bailee thereof for hire.

This gas engine, as was known to Hobson, was required by King to drive his saw mill, and the way in which it was to be erected and was in fact erected was as follows: In the first place a bed of concrete was prepared in which were embedded two iron plates, out of each of the four outside corners of which an iron bolt projected upwards in a vertical position, having a screw at its uppermost end. The base-plate of the engine was fitted with four holes, one at each outside corner, so that when the engine was placed in position upon the concrete bed the four bolts projected through the four holes in the base of the engine, and nuts were then screwed down tightly upon the tops of the bolts, and thus the engine was kept in position and prevented from rocking and shifting, as it would have done if merely placed upon the concrete foundation without the aid of the projecting bolts. There was affixed to the engine when delivered to King a plate called a "hire plate," bearing the inscription, "This engine is the property of Wilfred Hobson, 80, Queen Victoria Street, E. C."

King paid some of the monthly instalments to Hobson and then fell into arrear, and he never completed the stipulated payments so as to become the owner of the gas engine as a chattel.

By a deed of transfer and further charge dated July 24, 1895, a mortgage debt of 400*l*. secured on King's land by a deed dated March 26, 1894, was assigned to the Rev. Mr. Gorringe, and King and his mortgagee conveyed to him the land in question (together with the saw mill, engine-house, warehouses, and other building erected thereon, and the fixed machinery and fixtures) in fee simple to secure the said sum of 400*l*., and a further advance of 200*l*., making a total of 600*l*., subject to the usual proviso for redemption.

On January 17, 1896, King was adjudicated a bankrupt, and in March, 1896, the mortgagee, Mr. Gorringe, entered and took possession of the mortgaged premises, together with the gas engine, which he found in its place as before mentioned.

J. Walton, Q. C., and Curtis Price, for the plaintiff.

Warrington, Q. C., and Willoughby Williams, for the defendant, were called upon as to the first question only.

Dec. 19. A. L. SMITH L. J. delivered the judgment of the Court (Lord Russell of Killowen C. J., Lindley and A. L. Smith L. JJ.). He said: This case, though small as to the amount, raises a considerable question, which is whether a mortgagee of land in fee, when he enters

upon the mortgaged premises, can take possession of an engine which is attached to the soil thereof by means of bolts and screws, although the engine did not and never had belonged to the mortgagor, but to a third party.

[The Lord Justice stated the facts substantially as above set out, and continued as follows:—]

The question is whether Mr. Gorringer is entitled, under the above circumstances, to the gas engine. It is not disputed that he is entitled to the land; but the plaintiff, Mr. Hobson, denies that he is entitled to the gas engine upon the ground that it had never become King's, and had always remained a chattel belonging to him, Hobson. There can be no doubt, upon a mortgage in fee of the land, that, as between the mortgagor and mortgagee, the mortgagee is entitled to all fixtures which may be upon the land, whether placed there before or after the mortgage. If North J., in the passage in his judgment which has been referred to in *Cumberland Union Banking Co. v. Maryport Hæmatite Iron and Steel Co.* [1892] 1 Ch. 425, meant to hold otherwise, in our opinion he was in error; but we doubt if he intended so to hold. The case of *Gough v. Wood & Co.* [1894] 1 Q. B. 713, decided in this court, in no way assists the plaintiff, and has no application to the present case. That case was decided solely upon the ground that the mortgagee had acquiesced in the removal by the mortgagor during his tenancy of trade fixtures. For additional confirmation of the ratio decidendi of this case what was said by Lindley L. J. and by Kay L. J. in the case of the *Huddersfield Banking Co. v. Henry Lister & Son* [1895] 2 Ch. 273, 282, 286, may be referred to. Even if in the present case a license had been granted by Gorringer to King to remove the gas engine during the continuance of a term, neither of which conditions in fact existed, Gorringer, by entering and taking possession of the land and engine, would have determined such licence.

We now come to the real point made on behalf of the plaintiff, Hobson. It is this. It is said that this gas engine never was a fixture, but always remained a chattel, and consequently never passed to Gorringer as mortgagee of the land. It obviously did not pass to him as a chattel under the mortgage to him of "fixed machinery," for, if a chattel, it ever remained Hobson's, and never was the property of King; and unless Mr. Gorringer takes the engine as part of the land mortgaged to him he does not take it at all. Now, leaving out of consideration for the present the hire and purchase agreement of January 7, 1895, there is a sequence of authorities which establish that the gas engine, affixed as it was and for the purpose for which it was to King's freehold, ceased to be a chattel and became part of the freehold. Take first of all the case of *Wiltshire v. Cottrell* (1853) 1 E. & B. 674, 688. There the Court of Queen's Bench held that a threshing machine fixed by bolts and screws to posts which were let into the ground, and which machine could not be got out without disturbing some of the soil, would clearly pass under a conveyance of land and all fixtures. In the

case of *Mather v. Fraser* (1856) 2 K. & J. 536, which was a case between the assignees of a mortgagor and mortgagees, Page Wood V. C. held that the machinery fixed to the land, whether by screws, solder, or other permanent means, passed to the mortgagees. Again, in *Walmsley v. Milne* (1859) 7 C. B. (N. S.) 115, which was a case between a mortgagor and mortgagee in fee, the Court of Common Pleas held that a steam engine and boiler and other implements secured by bolts and nuts to the walls, though they were all capable of being removed without injury either to the machinery or to the premises, were fixtures, and passed to the mortgagee as part of the freehold. In *Climie v. Wood* (1868) L. R. 3 Ex. 257, which was a case between mortgagor and mortgagee in fee, the jury found that an engine and boiler which were used for sawing purposes (the engine being screwed down to planks upon the ground and the boiler being fixed in the brickwork) were trade fixtures, had been so fixed for their better use and not to improve the inheritance, and that they were removable without any appreciable damage to the freehold. The Court of Exchequer, nevertheless, held that the engine and boiler passed to the mortgagee, and this judgment was affirmed by the Court of Exchequer Chamber (1869) L. R. 4 Ex. 328, Willes J., who delivered the judgment of the Court, stating that the reasons for a tenant with a limited interest being allowed to remove trade fixtures were not applicable to the owner of the fee. In *Longbottom v. Berry* (1869) L. R. 5 Q. B. 123, which was a case between assignees of a mortgagor and mortgagees, it was also held that machinery annexed to the floor of a building in a "quasi-permanent manner" by means of bolts and screws passed to the mortgagees; and in *Holland v. Hodgson*, L. R. 7 C. P. 328, the Exchequer Chamber affirmed *Mather v. Fraser* (1856) 2 K. & J. 536, and *Longbottom v. Berry* (1869) L. R. 5 Q. B. 123, and held that looms attached by means of nails driven through holes in the feet of the looms into the floors, which attachment was necessary to keep the looms steady when at work, and which nails could be drawn easily and without any serious damage to the flooring, formed part of the realty, and passed to the mortgagee in fee. If there had been in this case nothing but the existing visible degree of annexation of the gas engine to King's freehold, and the known object for which such annexation had taken place, the authorities conclusively establish that the gas engine had ceased to be a chattel, and had become part of the freehold.

But it was argued that the terms of the hiring and purchase agreement caused this engine to remain a chattel, notwithstanding its annexation to the soil, for it was said that the intention of the parties who placed it where it was must be considered, and if this consideration showed that the intention was that the chattel was not to be a fixture, though actually fixed to the freehold, it still remained a chattel. In support of this argument a passage in the judgment of Lord Blackburn (then Blackburn J.), when delivering the judgment of the Exchequer Chamber in *Holland v. Hodgson*, L. R. 7 C. P. 328, was quoted. That

learned judge, when dealing with what were or were not fixtures, says, L. R. 7 C. P. 335: "Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel." The question in each case is whether the circumstances are sufficient to satisfy the onus.

It is said on behalf of the plaintiff that the hire and purchase agreement shows an intention on Mr. Hobson's part, as also on King's part, that the gas engine should remain a chattel until King had paid the stipulated instalments, which he never did. Now, if the engine had been a trade fixture, erected by King as tenant, with a limited interest, we apprehend that when affixed to the soil, as it was, it would have become a fixture — i. e., part of the soil, and would immediately have vested in the owner of the soil, subject to the right of King to remove it during his term. "Such," says Lord Chelmsford, in *Bain v. Brand* (1876) 1 App. Cas. 762, 772, "is the general law. But an exception has been long established in favour of a tenant erecting fixtures for the purposes of trade, allowing him the privilege of removing them during the continuance of the term. When he brings any chattel to be used in his trade and annexes it to the ground it becomes a part of the freehold, but with a power as between himself and his landlord of bringing it back to the state of a chattel again by severing it from the soil. As the personal character of the chattel ceases when it is fixed to the freehold, it can never be revived as long as it continues so annexed."

It seems to us that the true view of the hiring and purchase agreement, coupled with the annexation of the engine to the soil which took place in this case, is that the engine became a fixture — i. e., part of the soil — when it was annexed to the soil by screws and bolts, subject as between Hobson and King to this, that Hobson had the right by contract to unfix it and take possession of it if King failed to pay him the stipulated monthly instalments. In our opinion, the engine became a fixture — i. e., part of the soil — subject to this right of Hobson which was given him by contract. But this right was not an easement created by deed, nor was it conferred by a covenant running with the land. The right, therefore, to remove the fixture imposed no legal obligation on any grantee from King of the land. Neither could the right be enforced in equity against any purchaser of the land without notice of the right, and the defendant Gorringer is such a purchaser. The plaintiff's right to remove the chattel if not paid for cannot be enforced against the defendant, who is not bound either at law or in equity by King's contract. The plaintiff's remedy for the price or for damages for the loss

of the chattel is by action against King, or, he being bankrupt, by proof against his estate.

This, in our judgment, is sufficient to determine this case in favour of the defendant; but as another point has been stoutly argued on behalf of the plaintiff, we will deal with it. It is said that the intention that the gas engine was not to become a fixture might be got out of the hire and purchase agreement, and, if so, it never became a fixture and part of the soil, and it was said that the case of *Holland v. Hodgson*, L. R. 7 C. P. 328, had so decided. For this point it must be assumed that such intention is manifested by the hiring and purchase agreement, though, as before stated, we think it is not. Now, in *Holland v. Hodgson*, L. R. 7 C. P. 328, Lord Blackburn, when dealing with the "circumstances to show intention," was contemplating and referring to circumstances which showed the degree of annexation and the object of such annexation which were patent for all to see, and not to the circumstances of a chance agreement that might or might not exist between an owner of a chattel and a hirer thereof. This is made clear by the examples that Lord Blackburn alludes to to show his meaning. He takes as instances (a) blocks of stone placed in position as a dry stone wall or stacked in a builder's yard; (b) a ship's anchor affixed to the soil, whether to hold a ship riding thereto or to hold a suspension bridge. In each of these instances it will be seen that the circumstance to show intention is the degree and object of the annexation which is in itself apparent, and thus manifested the intention. Lord Blackburn in his proposed rule was not contemplating a hire and purchase agreement between the owner of a chattel and a hirer or any other agreement unknown to either a vendee or mortgagee in fee of land, and the argument that such a consideration was to be entertained, in our judgment, is not well founded.

It was further argued on behalf of the plaintiff that the cases of *Wood v. Hewett*, 8 Q. B. 913, and of *Lancaster v. Eve*, 5 C. B. (N. S.) 717, showed that the intention of the parties affixing a chattel to the soil must be ascertained when considering whether a chattel is or is not a fixture and part of the soil. In our opinion these cases do not show this, and, indeed, if they did, as before stated, if the hire and purchase agreement is considered, it does not show what the plaintiff says it does. In the first case (*Wood v. Hewett*, 8 Q. B. 913,) the plaintiff, a miller, had put a movable hatch which worked up and down a groove in some immovable masonry and brickwork upon the defendant's land, and had so used it for years, the complaint against the defendant being that he had pulled up and taken away the hatch. The question was whether this movable hatch remained the plaintiff's or had become the property of the defendant. The jury found that this hatch remained the property of the plaintiff, and the Court in banco held, as we read the case, that the jury were well warranted in finding that between the plaintiff and the defendant the former had become entitled to have the hatch which was his own property standing in the soil of the defend-

ant; in other words, that it might be inferred that the plaintiff had acquired an easement of having his hatch on the defendant's land, and could, therefore, sue for interference therewith. There was no question in that case between a mortgagee and a third party. In the second case (*Lancaster v. Eve*, 5 C. B. (N. S.) 717), the plaintiff, who was a wharfinger, many years before the action was brought, had driven a pile into the bed of the Thames, which was the property of the Crown, for the purpose of carrying on the necessary business of his wharf, and for years and years had used this pile without interruption by any one until the defendant's barge, by reason of the negligence of the defendant's servant, ran against it and carried it away. The point taken by the defendant was that the pile had been affixed to and formed part of the bed of the river, which was not the property of the plaintiff, and that, therefore, he could maintain no action for injury thereto; but the Court held that, as between the plaintiff and the Crown, it ought to be inferred that, although the pile had been affixed in the soil of the river, yet it was so affixed by agreement between the plaintiff and the Crown that the former should have an easement over the Crown's property so as to be able to use the pile necessary for carrying on the business of the plaintiff's wharf. This is the point decided, though there are, as has been pointed out, some isolated passages as to the intention of persons when affixing a chattel to the soil. That the plaintiff had a cause of action in some form or other against the defendant cannot be denied; but if the case decided, as it is argued it did, that the pile remained a chattel we do not agree with it. That a person can agree to affix a chattel to the soil of another so that it becomes part of that other's freehold upon the terms that the one shall be at liberty in certain events to retake possession we do not doubt, but how a *de facto* fixture becomes not a fixture or is not a fixture as regards a purchaser of land for value without notice by reason of some bargain between the affixers we do not understand, nor has any authority to support this contention been adduced. For the above reasons in our judgment the gas engine became affixed to and was part of King's freehold, and thus passed to Mr. Gorringer as mortgagee in fee of King's land.

The point made upon the hire plate on the gas engine when delivered comes to nothing, for it is no more than an indication of what the agreement was between Hobson and King, and as there is no evidence whatever that Mr. Gorringer was ever made aware of it, it cannot affect his right as mortgagee in fee of King's land.

In our judgment Kekewich, J. was right when he gave judgment as he did for the defendant, and this appeal must be dismissed with costs.¹

¹ See *Cumberland Bkg. Co. v. Maryport Co.*, [1892] 1 Ch. 415, followed in *Gough v. Wood*, [1894] 1 Q. B. 713; 15 Law Qu. Rev. 165.

SHOEMAKER v. SIMPSON.

SUPREME COURT OF KANSAS. 1876.

[Reported 16 Kan. 43.]

REPLEVIN for twenty-six bars of railroad iron, brought by *Shoemaker, Miller & Co.* as plaintiffs, against *Wm. A. Simpson*, and two others. The opinion, *infra*, contains a full statement of the facts and proceedings. Trial by the court, without a jury, at the June Term, 1871. Findings and judgment in favor of the defendants, and plaintiffs bring the case here for review.

J. P. Usher, for plaintiffs.

Nelson Cobb, W. W. Nevison, and S. A. Riggs, for defendants.

The opinion of the court was delivered by

VALENTINE, J. This was an action of replevin brought by Shoemaker, Miller & Co. against Wm. A. Simpson and others, for the recovery of twenty-six bars of railroad iron. The facts, stated briefly, are substantially as follows: Originally Shoemaker, Miller & Co. owned a large lot of railroad iron (including said twenty-six bars) at the state line, near Wyandotte. They intended to use said iron in building a railroad, which they had previously agreed to build for the Kansas Pacific Railway Company (then Union Pacific Railway Company, Eastern Division), from Junction City, westwardly. They employed said Kansas Pacific Railway Company to transport said iron from the state line westwardly to the place where they expected to use it. At the same time William A. Simpson (one of the defendants) owned certain town lots in the city of Lawrence, on the north side of the Kansas river, and between the said river and the Kansas Pacific Railway. Previously a railroad track had been constructed across said lots from the Kansas Pacific Railway to said river. But at this time, the iron which had originally been put on said track had been removed therefrom, and only the road-bed and cross-ties then remained. About this time the Kansas Pacific Railway Company, or its agents, took said twenty-six bars of iron from the iron of Shoemaker, Miller & Co. at the state line, transported them to Lawrence, and then spiked them down on the said cross-ties on the lots of said William A. Simpson. This was done by the Kansas Pacific Railway Company, or its agents, for the temporary purpose of obtaining some ninety car-loads of sand from the Kansas river, and it was intended to remove said iron as soon as the sand was obtained. This was all done without the knowledge or consent of either Shoemaker, Miller & Co., or said Simpson. The railway company had however taken other iron from Shoemaker, Miller & Co. for which they subsequently settled, but the parties never settled for this particular iron, and Shoemaker, Miller & Co., objected to the railway company taking or using their iron in any such manner. Afterward, said Simpson through his agents removed said twenty-six bars of iron

from his said lots, claiming the same to be his own. Shoemaker, Miller & Co. then commenced this action, and replevied said twenty-six bars of iron from said Simpson and his agents, the other defendants. The action was tried in the court below by the court without a jury. The court made separate and special findings of fact and of law. Upon these findings the court rendered judgment for the defendants and against the plaintiffs.

We think the court below erred. We know of no way by which an innocent person can be permanently and legally deprived of his property against his will by the wrongs and trespasses of others, so long as it remains within the power of such innocent person to reclaim his property without committing any serious or substantial injury to the person or property of any other person. In the present case the plaintiffs committed no wrong; and they never consented that their property should be taken from them, or used in the manner that it was used. The railway company committed the first wrong by taking and using the property of the plaintiffs in the manner they did. They committed a wrong against the plaintiffs by taking their iron without their leave, and also committed a wrong against the defendants by putting the iron on defendants' land without the defendants' leave. But the defendants committed the second wrong by attempting to profit from the wrongs of the railway company, and by attempting to make the iron of innocent parties their own. And the wrong of the defendants was even greater than that of the railway company. The railway company attempted to deprive the plaintiffs of their property temporarily only. But the defendants attempted to deprive the plaintiffs of their property forever. But the wrongs of the railway company and the defendants, combined, can hardly cause the property of the plaintiffs to become the property of the defendants. The theory upon which the defendants claim that the property of the plaintiffs became their property is as follows: The said iron was spiked down to said cross-ties. It then became a part of the realty; and as the defendants owned the realty, they therefore owned the iron. And they further claim that the subsequent removal of the iron from said cross-ties did not have the effect to change the property back from themselves to the plaintiffs. The whole question in this case therefore depends upon whether said twenty-six bars of iron became a part of the defendants' real estate as between the plaintiffs and the defendants. If it did not become real estate at all, or if it did not become real estate as between the plaintiffs and defendants, then the plaintiffs must recover. It being real estate as between the defendants and the railway company, or as between the defendants and every other person in the world except the plaintiffs, would not enable the defendants to recover. Now we suppose, that where one person or one corporation owns both the road-bed of a railroad and the iron attached to it, the iron is unquestionably a part of the realty. And where a trespasser, not owning the road-bed, attaches his own iron to the road-bed, the iron immediately becomes a part of

the realty, and belongs to the owner of the road-bed. But neither of these cases is the present case. It is sometimes very difficult under the peculiar circumstances of a particular case to determine whether a particular thing is a part of the realty or not. It does not depend upon one fact alone, but generally upon several facts. And among these facts are those of attachment to the soil, the intention of the parties, and those facts which enter in to show where the equities and justice of the case are. Even the nature and extent of the attachment have much weight in determining whether a given thing is a part of the realty or not. Even a trespasser may place his personal property on the soil of another, where no connection exists, without it becoming real estate, or without it becoming the property of the owner of the soil. While on the other hand, the owner of the soil might even steal the personal property of another, and so incorporate it into his real estate that it would become a part thereof, and could never be reclaimed by the owner. And between these two extremes there are infinite degrees and modes of attachment and connection of various things with the soil. Where the connection is slight, property is often considered personal property; whereas, if the connection were close and intimate it would be considered real estate. But the other facts have a controlling influence in determining whether a given thing is a part of the realty or not. A key to the door of a house is a fixture, and a part of the realty, although at the time it may not be at or near the premises to which it belongs. While on the other hand, annual crops, and a nursery of young trees raised for sale, may not be a part of the realty, but only chattels, although most firmly and intimately attached to the very soil itself. Even dwelling-houses, or indeed anything placed by men upon the soil, if they can be again removed, either in bulk or in pieces, may under some circumstances be only chattels, although they may be ever so firmly attached to the soil. The intention of the parties is one of the strongest elements in determining questions of this kind. This is often exemplified as between landlord and tenant, but it is not confined to them. *Haven v. Emery*, 33 N. H. 66; *Dame v. Dame*, 38 N. H. 429; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Wagner v. C. & T. Rld. Co.*, 22 Ohio St. 563; *Hines v. Ament*, 43 Mo. 298; *Fuller v. Tabor*, 39 Me. 519. And so have equitable considerations a strong influence in determining questions of this kind. In equity money is often considered as land, and land as money. In Wisconsin it has been held, "that where rails have been placed along the line of an intended fence for the purpose of being laid into the fence, though not actually applied to that use, they pass by a deed of the land, there having been a manifest appropriation to the use of the land." (*Conklin v. Parsons*, 1 Chandler, 240, 244.) While in Missouri it has been held that where a fence was put on another's land, through a mistake of the boundary lines, the fence remained the personal property of the person who put it there. (*Hines v. Ament*, 43 Mo. 298. See also *Fuller v. Tabor*, 39 Me. 519.) The Wisconsin and Missouri decisions

are probably both correct. In the present case the connection between the iron and the real estate to which it was attached is not very close or intimate. The iron may be removed without substantial injury to either the iron or the real estate. And railroad iron, fastened down to the road-bed, as this was, does not necessarily become a part of the real estate. It may remain personal property. (*Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Haven v. Emery*, 38 N. H. 66.) It was never the intention of the plaintiffs that this iron should become a part of the defendants' real estate. Indeed, no person ever had any such intention except the defendants themselves. The plaintiffs never intended to give this iron to the defendants. They never intended to abandon it to any person who might take possession of it. They never committed any trespass or wrong toward the defendants. And it would be against justice and equity to deprive them of their property. The defendants seem to specially rely upon the case of *Sparks v. Spicer*, 1 Lord Raymond, 738. This case was decided one hundred and seventy-eight years ago. The entire report of the case reads as follows: "SPARKS *vers.* SPICER; Mich.: 10 Will. III.; per Holt, Chief Justice. If a man be hung in chains upon my land; after the body is consumed, I shall have gibbet and chain. Said upon a motion for a new trial." Now the gibbet and chains probably belonged originally to the county, or the public; and it is probable that when a man was hung, the public never intended to reclaim the gibbet and chains, but intended to wholly abandon them to the owner of the land. This may have been so by special statute, or by special custom; and in either case it would prove nothing for the defendants. The report of the case certainly does not pretend to promulgate the doctrine, or even intimate, that the gibbet and chains would become real estate. The report does not show whether the consent of the owner of the land that the man might be hung on his land, should first be obtained or not; but in any case, the putting of the gibbet and chains on the land would be the voluntary act of the owner of the gibbet and chains, through its agents, the public officers, and therefore such owner should abide the consequences of its own acts, whatever they might be. A wrongdoer may lose his personal property by voluntarily attaching it to the land of another. A person not a wrongdoer, may, by his own consent, lose his personal property by attaching it or allowing it to be attached to the land of another. A person may even lose his personal property by wholly abandoning it to any person who may pick it up, although it may never be attached to any person's real estate. And an innocent person may sometimes against his consent lose his personal property by the same being incorporated into the real estate of some other person, so that it cannot be separated without great inconvenience and loss. But we do not think that any innocent person can be deprived of the title to his personal property against his consent by having it attached without his consent to the real estate of another by a third person, where such personal property can be removed without any great inconvenience, and without any substantial injury to the real estate.

There is one other question involved in this case, presented by the defendants for our consideration. The plaintiffs did not make any demand for the property in controversy before they commenced this action; and the defendants now claim that because of such want of demand the plaintiffs cannot maintain their action. Now, a demand of the property before commencing an action of replevin is necessary only where the possession of the property by the defendant is rightful, or at least not wrongful, and where a demand is required to terminate such rightful possession, or to convert what was previously an innocent possession into a wrongful one. A demand never was necessary in a replevin action where the possession of the property by the defendant was already wrongful without a demand. And all that is necessary to make the possession of the property of another wrongful in law, is, that the possession be without the authority of the owner, and inconsistent with his rights. We think it may be laid down as a rule, that whenever one person obtains the possession of the personal property of another without the consent of the owner, and then without any right which the law will recognize, asserts a claim to the property inconsistent with the owner's right of property and right of possession, the possession of such person will immediately become illegal and wrongful, and no demand for the property will be required to be made by the owner before he commences an action of replevin for the recovery of the same, although the possessor thereof may ever so honestly entertain the belief that his claim to the property is both legal and just. An innocent owner of property is not to be subject to additional inconveniences and burdens, merely because some other person may be innocent and ignorant. The innocence and ignorance of the person in possession of another's property cannot in any manner abridge the legal rights of the owner thereof. The owner of property who has the present and existing right of possession is not to be postponed on account of the ignorance or innocence of some other person who claims adversely to him. Nor is such owner, if he commences an action of replevin for his property, bound to tender an issue, or to litigate a question, founded merely upon the ignorance and innocence of the party who claims adversely to him. These views we think are sustained by the great weight of authority: *Trudo v. Anderson*, 10 Mich. 357; *Ballou v. O'Brien*, 20 Mich. 304; *Clark v. Lewis*, 35 Ill. 417; *McNeill v. Arnold*, 17 Ark. 155; *McDonald v. Smith*, 21 Ark. 422; *Galvin v. Bacon*, 11 Me. 28; *Newell v. Newell*, 34 Miss. 386; *Smith v. McLean*, 24 Iowa, 322. The last two cases decide that a defendant, by pleading title in himself, waives any right that he might otherwise have to claim that a previous demand should have been made for the property. Of course, replevin could not be maintained against a person who came innocently into the possession of the property, who never claimed any interest in the same, and who never disputed the owner's right thereto. But if sued he should disclaim, and not set up title and right of possession in himself, as the defendants did in this

case. With respect to the question of a necessity for a demand, where the defendant has come into the possession of the property with the consent of the owner, and then wrongfully claims the property as his own, we have not expressed any opinion, and shall not do so in this case. In the present case the defendants did not come into the possession of the property with the consent of the owners; and after they got possession of it they claimed it as their own; and after this suit was commenced they set up in their answer an affirmative claim of title and right of possession in themselves; and they obtained a judgment to that effect in the court below. We think no demand was necessary in this case. Or at least we think there was no necessity for the plaintiffs, on the trial, to show by evidence that a demand was made for the property by the plaintiffs, before the suit was commenced.

The judgment of the court below will be reversed, and cause remanded with the order that judgment be rendered on the findings of the court below in favor of the plaintiffs, and against the defendants.

All the Justices concurring, except BREWER, J., who dissents from the paragraph of the opinion beginning "There is one other question involved."

JUSTICE *v.* NESQUEHONING VALLEY R. R. CO.

SUPREME COURT OF PENNSYLVANIA. 1878.

[*Reported 87 Pa. 28.*]

April 2d, 1878. Before AGNEW, C. J., SHARSWOOD, MERCUR, GORDON, PAXSON, WOODWARD and TRUNKEY, JJ.

Error to the Court of Common Pleas of Carbon County: Of January Term 1878, No. 255.

The proceedings in the court below were as follows: Esther S. Justice and others were the owners of a tract of land which in 1869 the Nesquehoning Valley Railroad Company made an effort to purchase, but owing to the large number of the owners and their failure to agree upon terms, the offers of the company were refused. The company then entered upon the land and built its railroad, to which there was no objection made other than a notice to repair injuries done to tenants. A bond was offered to the husband of one of the owners which was refused. In 1872 the owners united in an action of ejectment against the company, in which judgment was confessed by the company, April 3d, 1874, and execution stayed until proceedings to assess damages should be completed. The company then petitioned the court for the appointment of viewers to assess the damages for injuries done to the owners, by the construction of their road, who were appointed and assessed the damages at \$4,885.94. From their report, the landowners appealed to the Court of Common Pleas. At the trial, before Dreher,

P. J., the plaintiff submitted the following point, to which is appended the answer of the court:—

“That in estimating the damages the jury are to consider the market value of the land on the 3d day of April, 1874, the date of filing the petition for viewers to assess damages, including therein all structures thereon erected, such as railroad ties, rails, &c., and find to what extent the property has been injured by the location and construction of the railroad, and their verdict should be for the amount of the injury and the market value of the land with the improvements thereon, taken on the 3d day of April, 1874.”

Ans. “That proposition we negative. We ruled in this case upon an offer of evidence upon the part of the plaintiffs that that was not the rule of law; they cannot recover for the improvements which the railroad company put upon the land, if they occupied it for the purpose of constructing their road.”

In their general charge the court said:—

“You are to allow for the difference between what the property as a whole property would have brought in the market before the railroad was located (or what it would have brought unaffected by the railroad), and what it would bring in the market immediately after the railroad was built; and if it is worth less as affected by the railroad, then the difference between those two values constitutes the amount of damages the party is entitled to.”

The verdict was for the plaintiffs for \$1,074.41. They then took this writ and, *inter alia*, assigned for error the answer to the foregoing point and the portion of the charge noted.

E. G. Platt, Samuel Dickson, and J. D. Bertolette, for plaintiffs in error.

Charles Albright and Henry Green, for defendant in error.

Chief Justice AGNEW delivered the opinion of the court, May 6th, 1878.

This was a proceeding to view and value land taken by the Nesquehoning Valley Railroad Company for its railroad, and to assess damages therefor. It came into the court below by appeal from the finding of viewers, and was tried before a jury.

As stated in the argument of the plaintiffs in error, there is a single question raised by all the assignments of error, to wit: whether the plaintiffs were the owners of the ties, rails and other structures placed on the land by the railroad company before the 3d of April, 1874, the date of the verdict in ejectment. The facts are few, and fairly raise the question. The plaintiffs were the owners of a large tract of land lying at the entrance or “key” to the valley, and divided by the Nesquehoning creek, leaving fifty acres to the south of the stream, consisting of valley and timbered hillside. The railroad nearly bisects these fifty acres. In 1869 the railroad company endeavored to purchase the whole of this part, but owing to the large number of owners failed to do so. The company entered and built its road without objection,

except it was notified to repair injuries to tenants. A bond was offered to the husband of one of the owners, who said he did not want it. The facts exhibit no outrage in the taking of the property, but the entry was clearly a trespass. No bond having been filed and approved according to law, the entry was irregular, and subjected the company to an action of ejectment, in which judgment was confessed April 3d, 1874, and execution stayed until the proceeding to assess the damages should be completed.

The company being a trespasser, and the entry not in conformity to law, the question is, whether this irregular proceeding operated as a dedication in law of the property in the ties and rails to the owners of the land, so as to entitle them to include these things in the assessment of the damages under the railroad law, and recover their value as an accession to the value of the land taken by the company. A careful consideration and analysis of the case before us will show that it differs in essential respects from that of a mere *tort-feasor*, whose structures upon the land of another enure to the benefit of the owner of the land.

The common-law rule is undoubted, that a trespasser, who builds on another's land, dedicates his structures to the owner. The reason is obvious, for like him who sows where he cannot reap, he can obtain no advantage by his wrong, and having affixed his chattels to the realty, they become part of it, and he cannot add further injury by tearing them down. Even a tenant is to a modified extent affected by the same rule. If he improves under a covenant, the covenant governs his right of removal. So, if in favor of trade he erects structures for his business, doing no unnecessary or irreparable injury to the land, yet having done this without consent, he must remove his erections before the expiration of his term, otherwise he will be presumed to dedicate them to his lessor. There is also to be noticed a clear distinction between putting down a railroad track under a lease, and an act of appropriation of the land under a charter. This is clearly pointed out in *Heise v. Pennsylvania Railroad Co.*, 12 P. F. Smith, 67. The very intent of an appropriation of land, is to place upon it, and own and use the structures necessary to carry out the charter purpose. Hence no dedication of the material can be inferred in such a case. In this we perceive how differently the common law itself must view the application of its own rules. The great merit of the common law, so often commended by jurists, is its plasticity as a system of principles (and not merely of rigid rules), which can be adapted to new conditions in the affairs of men. Modern inventions and discoveries have so far transcended the conditions of former times, that to apply the rule as to a mere trespasser, whose entry is a *tort* pure and simple, to the case of one authorized to enter for a great public purpose, merely because of an irregularity in the manner of proceeding, would be as vain as to attempt to dress a full grown man in the garb of his childhood.

This is not the case of a mere trespass by one having no authority to enter, but of one representing the state herself, clothed with the power of eminent domain, having a right to enter, and to place these materials on the land taken for a public use — materials essential to the very purpose which the state has declared in the grant of the charter. It is true the entry was a trespass, by reason of the omission to do an act required for the security of the citizen, to wit: to make compensation or give security for it. For this injury the citizen is entitled to redress. But his redress cannot extend beyond his injury. It cannot extend to taking the personal chattels of the railroad company. They are not his, and cannot increase his remedy. The injury was to what the landholder had himself, not to what he had not. Then why should the materials laid down for the benefit of the public be treated as dedicated to him? In the case of a common trespasser, the owner of the land may take and keep his structures *nolens volens*, but not so in this case; for though the original entry was a trespass, it is well settled, that the company can proceed in due course of law to appropriate the land, and consequently to reclaim and avail itself of the structures laid thereon. *Harrisburg v. Crangle*, 3 W. & S. 460; *McClinton v. Railroad Co.*, 16 P. F. Smith, 409; *Railroad Co. v. Burson*, 11 Id. 379. And in *Harvey v. Thomas*, 10 Watts, 63, it was held that the subsequent proceeding to assess compensation, was a protection against a recovery of vindictive damages.

Another evident difference between a mere *tort-feasor* and a railroad company is this — the former necessarily attaches his structure to the freehold, for he has no less estate in himself, but the latter can take an easement only, and the structures attached are subservient to the purpose of the easement. A railroad company can take no freehold title, and when its proper use of the easement ceases, the franchise is at an end. There is no intention in fact to attach the structure to the freehold. We have therefore these salient features to characterize the case before us, to wit: the right to enter on the land under authority of law, to build a railroad for public use; the acquisition thereby of a mere easement in the land; the entire absence of an intention to dedicate the chattels entering into its construction to the use of the land; the necessity for their use in the execution of the public purpose; and, lastly, the power to retain and possess these chattels and the structures they compose, by a valid proceeding at law, notwithstanding the original illegality of the entry. For the latter the owner has his appropriate remedies; his action of ejectment to recover and retain his land and its use, until the company shall proceed according to law, and his action of trespass to recover damages for the injury sustained by the unlawful entry and holding possession, and whatever loss has been caused by these illegal acts.

There are some analogies bearing remotely on the question before us, showing that property is not gained by the owner of land because found upon it. Thus, in the case of property carried off by a flood and

stranded on the premises of another, the owner may follow it, enter and take it, or if the owner of the land convert it, may recover its value: *Forster v. Bridge Co.*, 4 Harris, 393; *Etter v. Edwards*, 4 Watts, 63. And even a sale will not carry unknown secreted valuables: *Hutmacher v. Harris, Adm'r*, 2 Wright, 491.

But a case bearing a close analogy, indeed deciding the principle on which this case rests, is *Meigs's Appeal*, 12 P. F. Smith, 28. In the year 1862, the United States, in the prosecution of the war, erected buildings on the public common of York for military barracks and hospitals. After the close of the war the government was about removing the materials, when the borough authorities proceeded to enjoin the removal, on the ground that the buildings had been affixed to the realty. In that case we said, referring to *Hill v. Sewald*, 3 P. F. Smith, 271, that the old notion of a physical attachment had long since been exploded in this state, and that the question of fixture, or not, depends on the nature and character of the act by which the structure is put in place, the policy of law connected with its purpose and the intentions of those concerned in the act. This language applies emphatically to the case now under consideration. It was further said then, the nature and character of the structures are also to be considered. They were not improvements made for objects connected with the soil — neither intended to give value to it, nor to receive value from it; so, precisely here, the railroad having no connection with the improvement of the land or its uses. “The act” (says the opinion) “is distinguishable from that of an ordinary trespasser. There was no intent to improve the ground, or to make it accessory to some business or employment. It was not an assertion of title in the soil, or of an intention to hold adverse possession. Indeed there was not a single element in the case which characterizes the act of a *tort-feasor*, who annexes his structure to the freehold, and is therefore presumed to intend to alter the nature of the chattel and convert it into realty, and thereby to make a gift of it to the owner of the freehold.” This language strongly characterizes the case before us. Here as there the purpose is a public use; there was no intent to hold adversely as a trespasser, nor to improve the ground or make it useful and valuable by the erection. The rails and ties were not intended to be attached to the freehold, but were laid down as part of an easement under a franchise of the state. There was no intent to use the land as an owner would, and no intent to abandon the materials to the use of the owner, but they were subject to a legal proceeding resulting in maintaining both ownership and use for the charter purpose. We think therefore the ownership of the rails, ties, &c., did not vest in the plaintiff in error by the mere trespass in the original entry.

Judgment affirmed.

MERCUR and GORDON, JJ., dissenting.

SECTION III.

SEVERANCE.

AND it is resolved in 14 H. 8, 25 b, in *Wistow's Case of Gray's Inn*, that if a man has a horse-mill, and the miller takes the millstone out of the mill, to the intent to pick it to grind the better, although it is actually severed from the mill, yet it remains parcel of the mill, as if it had always been lying upon the other stone, and by consequence by the lease or conveyance of the mill it shall pass with it; so of doors, windows, rings, &c. The same law of keys; although they are distinct things, yet they shall pass with the house. *Liford's Case*, 11 Co. 46 b, 50 b.¹

ROGERS v. GILINGER.

SUPREME COURT OF PENNSYLVANIA. 1858.

[Reported 30 Pa. 185.]

ERROR to the Common Pleas of Bucks county.

This was an action of trover, brought in the court below by William T. Rogers and Paul Applebach, assignees of William Beek, against Philip Gilinger, Samuel Groff, Matthew H. Crawford, and Henry C. Hill; in which the parties agreed upon the following statement of facts, to be submitted for the opinion of the court, and considered in the nature of a special verdict. The decision to be upon the merits of the case, without regard to form, and either party to have a right to sue out a writ of error.

“William Beek was the owner in fee of a tract of land in Doylestown township, Bucks county, upon which was erected a large frame building, on stone foundations, designed to be used for the purposes of agricultural and other exhibitions. By deed dated the 26th of October, 1856, recorded the same day in the recorder's office of said county, in Miscellaneous Book No. 11, page 149, he assigned all his property (including the above) to the plaintiffs in trust for the benefit of his creditors.

“On the 28th of the same month, the building was blown down by a storm of wind. The foundations and floor were left nearly entire, but the whole building above the floor was a complete wreck, severed from its supports and broken up, so that it could not be replaced, or the materials be used in the construction of a similar building.

“Subsequently the sheriff levied upon the land, by virtue of an exe-

¹ *Burnside v. Twitchell*, 43 N. H. 390, 394, acc.

cution against Beek, issued on a judgment entered previously to the date of the assignment, and sold and conveyed the same to the defendants. The ruins of the building, at the time of sale, were in the same condition as immediately after it was blown down. The defendants took possession of the property, sold the ruins of the building and received the proceeds to their own use. The plaintiffs duly notified the defendants, that they claimed such parts of the building as were severed from the foundations, as personal property, and brought this action to recover damages for the taking of the same.

"The property was described in the advertisement by the sheriff, on the *ven. ex.* as containing about 28 acres of land, and that the improvements consisted of the wreck of the large exhibition house and all its materials,—the foundations, joists, and floor of the building being good, and more than one half of the doors, windows, roofing, and timbers could be used for the purpose of erecting another building of the kind. The property as advertised was struck off to the defendants for \$6000. The defendants afterward applied to the court for a rule to show cause why the sale should not be set aside, and they relieved from their bid, on the ground of the uncertainty whether the said wreck and materials passed to them as purchasers at sheriff's sale, as part of the real estate; and the court refused to grant the relief requested, and confirmed the sale.

"The *ven. ex.*, return, and proceedings to set aside the sale, are considered as a part of this case.

"If the court should be of opinion that the parts of the building severed from the foundations were personal property, then judgment to be entered in favor of the plaintiffs for the sum of \$698, with interest from June 21st, 1856; but should the court not be of such opinion, then judgment to be entered in favor of defendants."

The court below (*Smyser*, P. J.) entered judgment in favor of the defendants. Whereupon the plaintiffs sued out this writ of error.

Watson, for plaintiffs in error.

C. E. and *J. L. Dubois*, for defendants in error.

STRONG, J. The owner of a lot of ground upon which had been erected a large frame building, conveyed the property to assignees in trust for the benefit of creditors. Prior to the assignment, a judgment had been recovered against the assignor, which was a lien upon the real estate conveyed. Two days after the assignment had been made, a storm of wind demolished the building, leaving the foundation and floors nearly entire, but breaking the superstructure so that its materials could not be replaced, or used in the construction of a similar building. While in this condition, the whole was levied upon and sold under executions founded upon the judgment against the assignor, and the voluntary assignees now claim that the ruins of the frame building did not pass at the sheriff's sale; that they were personal property, and that the purchaser under the *venditioni exponas* having used them, is responsible to the assignees in an action of trover.

It may be premised that the assignees stand precisely in the shoes of Beek the first owner. If he could not assert against the purchaser at sheriff's sale, supposing no assignment had been made, that the fragments of the building were personalty, neither can they. It may also be remarked that the purchaser under the judgment has obtained all upon which the judgment was a lien.

Now clearly Beek, the first owner, could not have torn down the building, and converted the materials from realty into personalty, without diminishing the security of the judgment, impairing its lien, and wronging the judgment creditor. Though the statutory writ of *estrepement* might not have been demandable until after levy and condemnation of the property, yet equity would have enjoined against any such wrong. The building, as such, constituted a large part of the creditor's security, and his lien embraced every board and rafter which made a constituent part of the structure. Nor were the rights of the assignees any more extensive. They were mere volunteers. They took the property as land only, encumbered as a whole, and in every part, by the lien of the judgment. Their title was in one sense subordinate to the right of the judgment-creditor to take all which passed to them in satisfaction of his debt.

In *Herlakenden's Case*, 4 Rep. 62 a, it was resolved that if a lessee pulls down a house, the lessor may take the timber as a thing which was parcel of his inheritance. So in *Bowles's Case*, 11 Rep. 81 b, it was held that if the lessee cut down timber, the lessor may take it. Though severed, it is a parcel of the inheritance.

Nor will the *tortious* act of a stranger be allowed to injure the reversion. 2 M. & S. 494; 1 Term Rep. 55; *Garth v. Sir John Cotton*, 1 Vesey Sr. 524. These principles are reasserted in *Shult v. Barker*, 12 S. & R. 272; 7 Conn. 232; 3 Wendell, 104. Nor will a severance by the owner of that which was a part of the realty, unless the severance be with the intent to change the character of the thing severed, and convert it into personalty, prevent its passing with the land to a grantee. Thus it was held in *Goodrich v. Jones*, 2 Hill, 142, that fencing materials on a farm which have been used as part of the fences, but are temporarily detached without any intent to divert them from their use as such, are a part of the freehold, and as such pass by a conveyance of the farm to a purchaser.

Is the rule different when the severance occurs not by a *tortious* act, nor by a rightful exercise of proprietorship, without any intent to divert the thing severed from its original use, but by the act of God? The act of God, it is said, shall prejudice no one (4 Co. 86 b), yet the maxim is not true if a tempest be permitted to take away the security of a lien-creditor, and transfer that which was his to the debtor or the debtor's assignees. If trees are prostrated *per vim venti*, they belong to the owner of the inheritance, not to the lessee. *Herlakenden's Case*, *ut supra*. He takes them as a part of the realty. True, he may elect to consider them as personalty, and this he does when he brings trover

for their conversion; but until such election they belong to him as a parcel of the inheritance. If a tenant hold "without impeachment of waste," the property in the timber is in him; but if there be no such clause in his lease, and he remove from the land trees blown down, such removal is waste. That could not, however, be, unless, notwithstanding the severance, they continue part of the realty, for waste is an injury to the realty.

I am aware that it is said to have been held that if an apple-tree be blown down, and the tenant *cut* it, it is no waste. 2 Rolle Abr. 820. That may well be, for the falling of the tree is through the act of God, not of the tenant, and the *cutting* of the fallen timber is but an exercise of the tenant's right to estovers; but if he remove from the land *fallen* timber, it has been ruled to be waste.

What then is the *criterion* by which we are to determine whether that which was once a part of the realty has become personalty on being detached? Not capability of restoration to the former connection with the freehold, as is contended, for the tree prostrated by the tempest is incapable of reannexation to the soil, and yet remains realty. The true rule would rather seem to be, that which was real shall continue real until the owner of the freehold shall by his election give it a different character. In Shepherd's Touchstone, 90, it is laid down that "that which is parcel, or of the essence of the thing, although at the time of the grant it be actually severed from it, does pass by a grant of the thing itself. And therefore by the grant of a mill, the millstone doth pass, although at the time of the grant it be actually severed from the mill. So by the grant of a house, the doors, windows, locks, and keys do pass as parcel thereof, although at the time of the grant they be actually severed from it."

It must be admitted that the case before us is one almost of the first impression. Very little assistance can be derived from past judicial decision. There is supposed to be some analogy between the character of these fragments of the building and that of a displaced fixture. The analogy, however, if any, is very slight. These broken materials never were fixtures, though they had been fixed to the land. They had been as much land as the soil on which they rested. Severance had never been contemplated. One of the best definitions of fixtures is that found in *Shean v. Rickie*, 5 Mees. & W. 171. They are those personal chattels which have been annexed to the freehold, but which are removable at the will of the person who has annexed them, or his personal representatives, though the property in the freehold may have passed to other persons. Yet even fixtures, which but imperfectly partake of the character of realty, go to the purchaser at sheriff's sale of the land, though they have been severed tortiously, or by the act of God. Thus where a copper-kettle had been detached from its site in a brewery by one not the owner, had remained detached for a long period, and while thus severed had been pledged by the personal representatives of the owner, it was still held to have passed by a sheriff's sale of the brewery

under a mechanics' lien, filed before the severance. *Gray v. Holdship*, 17 S. & R. 413.

Without, however, discussing the question further, it will be perceived that in our opinion the broken materials of the fallen building must be considered as a parcel of the realty as between the assignees and the purchaser at sheriff's sale, and consequently that they passed by the sale to the purchaser. *The judgment is affirmed.*

NOBLE v. SYLVESTER.

SUPREME COURT OF VERMONT. 1869.

[*Reported 42 Vt. 146.*]

TROVER for a stone. Pleas, the general issue and two special pleas. Replication joining the issue tendered and traversing the special pleas. Trial by jury, May term, 1868, *Barrett, J.*, presiding.

The defendant averred in his special pleas that, prior to the 12th day of April, 1833, the plaintiff owned a piece of land in Bethel upon which was a rock, and from this rock the plaintiff had loosened the stone in question and moved it a very little; that on said 12th of April, the plaintiff sold and conveyed to one Daniel Wallace said piece of land, having said stone thereon as aforesaid, by a warranty deed having the usual covenants of warranty, and made no reservation or exception of said stone in said deed or in the sale of said land; that said Wallace thereupon went into possession of said land, and has so remained ever since, and said stone remained as the plaintiff left it for over thirty-two years, and until September, 1866, when said Wallace sold it to the defendant, who moved it off, and on to his own premises, and during all this time the plaintiff made no claim to it, but said Wallace always claimed it as his.

The plaintiff's evidence tended to show that he split out said stone with others about thirty-five years ago for the purpose of building a tomb with them; that they were black lime stone, and in layers about seventeen feet long and five feet wide, and from three to four inches thick; that he tried to take it off, but could not with the team he had, but raised it up, and propped it a little from the ground; that the plaintiff told Wallace what he got it out for, and what he intended to do with it, and reserved it in the sale of the land to him; that the defendant bought it of Wallace, and drew it off, and knew at the time, and previously, that the plaintiff claimed it; that the plaintiff never gave up his intention of building a tomb; that the plaintiff had at different times along said to certain persons that he reserved the stone in his sale of the land to Wallace; that plaintiff saw defendant and his men when they went to get it, and forbade their drawing it off; and tending to show its value.

The defendant's evidence tended to sustain the averments in his special pleas. The defendant claimed that the stone could be reserved or excepted only in the deed; but the court held otherwise, and allowed the plaintiff to give evidence of a parol reservation of it, to which the defendant excepted. The defendant objected to the plaintiff's proving his own sayings as to the stone after the date of the deed; but the court allowed him to prove them, to show that he had not abandoned his claim, to which the defendant excepted.

The defendant insisted that upon the evidence the plaintiff was not entitled to recover; but the court declined so to hold, and *pro forma* left the case to the jury, to find whether the plaintiff did with the stone as his evidence tended to show, and whether there was a parol exception of the stone at the time of the conveyance of the land, understood between the parties to the deed, and consented to by Wallace; instructing them that if they should so find, the plaintiff would be entitled to recover; and left it to them to find the facts upon the evidence, without commenting thereon, or giving them any charge on any other point (except as to the rule of damages), to which the defendant excepted.

Hunton and Gilman, for the defendant.

James J. Wilson, for the plaintiff.

PIERPOINT, C. J. It appears from the case that the stone in controversy was split out and removed from its original connection and position in the ledge, and laid up preparatory to its removal from the farm on which it was originally situated. This was done by the plaintiff, who was then the owner of the farm, and the object of splitting it out and putting it in such position was to remove it from the farm and use it in the construction of a tomb. This being the case, the stone may be regarded as being governed by the same principles that are applicable to timber, fence rails, and the like, that have been removed from the freehold in fact, but remain upon the premises for the purpose of being used there in the construction of fences, &c., and if on the land at the time the premises are conveyed they will pass by the deed; but if they are there not for the purpose of being used upon the premises, but to be removed elsewhere, then they do not pass by the deed. So of this stone, it having been severed from the freehold, for the purpose of removing it from the premises, to be used for a specific purpose elsewhere, we think it would not necessarily pass by the deed; but as there was nothing about the stone, or the position in which it was placed, to indicate the use to which it was to be put, whether for fencing or underpinning, or the like, upon the premises, or for use elsewhere, it was a proper subject of explanation between the plaintiff and Wallace, at the time the deed was executed, and such explanation might well be by parol; it was not an exception of that which would otherwise pass by the deed, but the giving to Wallace a knowledge of facts showing that it would not pass, and thus avoiding all misunderstanding or controversy about it in the future. The fact that such

information was accompanied by an exception in form, does not vary the principle. We think there was no error in admitting the parol testimony. And in submitting the question to the jury where there was a parol exception or not, if there was error, it is not an error of which the defendant has any right to complain, as it was putting the case, in this respect, in quite as favorable a light as he could legally claim.

We think it was not error in the court to allow the plaintiff to show his own sayings in respect to his ownership of the stone made after the deed to Wallace, not for the purpose of proving what took place between him and Wallace at the time the deed was made, but for the purpose of showing that he had not abandoned the property, inasmuch as the defendant in his pleadings and proof sets up the fact that the plaintiff had permitted the stone to remain where it was when the deed was executed up to the time the defendant took it away, as one ground of defence, and we are to assume that the court, in admitting the testimony for that special purpose, took care that the jury should understand that they were not to use or regard it for any other.

But it is insisted, that even if the plaintiff did retain the property in this stone, so that the title did not pass to Wallace, still he has lost his right to it by suffering it to remain on the premises of Wallace, down to the time it was sold to the defendant, and he took it away.

The jury have found that the stone was excepted in the sale, and remained the property of the plaintiff; that it was left upon the premises with the knowledge and assent of Wallace, and remained there over thirty years before the defendant purchased it of Wallace. The case shows that Wallace never interfered with the stone in any manner, never made any claim to it, never objected to its remaining there, or ever requested the plaintiff to remove it, but suffered it to remain there just as it was left when the deed was executed. The defendant now claims that the title to this stone became vested in Wallace by lapse of time, and we are called upon by his counsel to say, if thirty years under such circumstances is not sufficient to change the title, what time is sufficient? We do not feel called upon to give a definite answer to that question; but we feel safe in saying, when the property of one man is left upon the premises of another, with the knowledge and assent of the owner of such premises, that so long as such owner suffers such property to remain upon his premises, without objection or request to remove it, exercising no act of ownership over it and making no claim to it, just so long the title to the property remains the same, and is not divested from the one and vested in the other by mere lapse of time.

Wallace never was the owner of this stone, and if the plaintiff had abandoned it, it would not necessarily revert to Wallace; but the case does not show an abandonment, and it does not appear to have been put upon that ground at the trial below.

The lapse of time was an element proper to be considered by the

jury in determining the question submitted to them, and it is claimed that the County Court erred in not giving the jury special instructions in respect to it. It does not appear that there was any controversy upon the trial as to the propriety of their considering it, and there was no request, from either side, that the court should give any specific charge upon it. The evidence upon this point, as upon all others, was submitted to the jury; it was doubtless commented upon by the counsel on both sides in their arguments, and we have no reason to suppose it was not duly considered and weighed by the jury. Under the circumstances it was no more error to omit to refer to this particular piece of testimony than it was not to refer to any or every piece of testimony put in on either side, and it has never been regarded the legal duty of the court to refer specifically to each and every piece of testimony in the case, in the charge, especially when there is no such request. We find no error in the trial below.

The judgment of the County Court is affirmed.¹

SECTION IV.

REMOVAL OF FIXTURES.

A. *What Fixtures are Removable.*

I. BETWEEN LANDLORD AND TENANT.

POOLE'S CASE.

NISI PRIUS. 1703.

[*Reported 1 Salk. 368.*]

TENANT for years made an under-lease of a house in Holborn to J. S., who was by trade a soap-boiler. J. S., for the convenience of his trade, put up vats, coppers, tables, partitions, and paved the back-side, &c. And now upon a *fiery facias* against J. S., which issued on a judgment in debt, the sheriff took up all these things, and left the house stripped, and in a ruinous condition; so that the first lessee was liable to make it good, and thereupon brought a special action on the case against the sheriff, and those that bought the goods, for the damage done to the house. *Et per* HOLT, C. J., it was held, —

1st, That during the term the soap-boiler might well remove the vats he set up in relation to trade, and that he might do it by the common law (and not by virtue of any special custom) in favor of trade and to

¹ So of fence rails severed from the soil with intent that the severance shall be permanent. *Harris v. Scovel*, 85 Mich. 32. See *Shoemaker v. Simpson*, 16 Kan. 43, ante, p. 516; *Brackett v. Goddard*, 54 Me. 309, post, p. 600.

encourage industry: But after the term they become a gift in law to him in reversion, and are not removable.

2dly, That there was a difference between what the soap-boiler did to carry on his trade, and what he did to complete the house, as hearths and chimney-pieces, which he held not removable.

3dly, That the sheriff might take them in execution,¹ as well as the under-lessee might remove them, and so this was not like tenant for years without impeachment of waste; in that case he allowed the sheriff could not cut down and sell, though the tenant might: And the reason is, because in that case the tenant hath only a bare power without an interest; but here the under-lessee hath an interest as well as a power, as tenant for years hath in standing-corn, in which case the sheriff can cut down and sell.

ELWES v. MAW.

KING'S BENCH. 1802.

[*Reported 3 East, 38.*]

LORD ELLENBOROUGH, C. J.² This was an action upon the case in the nature of waste, by a landlord, the reversioner in fee, against his late tenant, who had held under a term for 21 years, a farm consisting of a messuage, and lands, out-houses, and barns, &c., thereto belonging, and who, as the case reserved stated, during the term and about 15 years before its expiration, erected at his own expense a beast-house, carpenter's shop, a fuel-house, a cart-house, a pump-house, and fold-yard. The buildings were of brick and mortar, and tiled, and the foundations of them were about a foot and a half deep in the ground. The carpenter's shop was closed in, and the other buildings were open to the front and supported by brick pillars. The fold-yard wall was of brick and mortar, and its foundation was in the ground. The defendant previous to the expiration of his lease pulled down the erections, dug up the foundations, and carried away the materials; leaving the premises in the same state as when he entered upon them. The case further stated, that these erections were necessary and convenient for the occupation of the farm, which could not be well managed without them. And the question for the opinion of the court was, Whether the defendant had a right to take away these erections? Upon a full consideration of all the cases cited upon this and the former argument, which are indeed nearly all that the books afford materially relative to the subject, we are all of opinion that the defendant had not a right to take away these erections.

Questions respecting the right to what are ordinarily called fixtures,

¹ Fixtures may be taken on attachment. See *Morey v. Hoyt*, 62 Conn. 542.

² The opinion sufficiently states the case.

principally arise between three classes of persons. 1st, Between different descriptions of representatives of the same owner of the inheritance; viz., between his heir and executor. In this first case, *i. e.*, as between heir and executor, the rule obtains with the most rigor in favor of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel anything which has been affixed thereto. 2dly, Between the executors of tenant for life or in tail, and the remainderman or reversioner; in which case the right to fixtures is considered more favorably for executors than in the preceding case between heir and executor. The 3d case, and that in which the greatest latitude and indulgence has always been allowed in favor of the claim to having any particular articles considered as personal chattels as against the claim in respect of freehold or inheritance, is the case between landlord and tenant.

But the general rule on this subject is that which obtains in the first-mentioned case, *i. e.*, between heir and executor; and that rule (as found in the Year Book, 17 E. 2, p. 518, and laid down at the close of *Herlakenden's Case*, 4 Co. 64, in Co. Lit. 53, in *Cooke v. Humphrey*, Moore, 177, and in *Lord Darby v. Asquith*, Hob. 234, in the part cited by my brother Vaughan, and in other cases) is that where a lessee, having annexed anything to the freehold during his term, afterwards takes it away, it is waste. But this rule at a very early period had several exceptions attempted to be engrafted upon it, and which were at last effectually engrafted upon it, in favor of trade and of those vessels and utensils which are immediately subservient to the purposes of trade. In the Year Book 42 E. 3, 6, the right of the tenant to remove a furnace erected by him during his term is doubted and adjourned. In the Year Book of the 20 H. 7, 13, a & b, which was the case of trespass against executors for removing a furnace fixed with mortar by their testator and annexed to the freehold, and which was holden to be wrongfully done, it is laid down, that "if a lessee for years make a furnace for his advantage, or a dyer make his vats or vessels to occupy his occupation during his term, he may remove them; but if he suffer them to be fixed to the earth after the term, then they belong to the lessor. And so of a baker. And it is not waste to remove such things within the term by some: and this shall be against the opinions aforesaid." But the rule in this extent in favor of tenants is doubted afterwards in 21 H. 7, 27, and narrowed there, by allowing that the lessee for years could only remove, within the term, things fixed to the ground, and not to the walls of the principal building. However, in process of time the rule in favor of the right in the tenant to remove utensils set up in relation to trade became fully established; and accordingly, we find Lord Holt, in *Poole's Case*, Salk. 368, laying down (in the instance of a soap-boiler, an under-tenant, whose vats, coppers, &c., fixed, had been taken in execution, and on which account the first lessee had brought an action against the sheriff), that during the term the soap-boiler might well remove the vats he set up in relation

to trade; and that he might do it by the common law, and not by virtue of any special custom, in favor of trade, and to encourage industry; but that after the term they became a gift in law to him in reversion, and were not removable. He adds, that there was a difference between what the soap-boiler did to carry on his trade, and what he did to complete his house, as hearths and chimney-pieces, which he held not removable. The indulgence in favor of the tenant for years during the term has been since carried still further, and he has been allowed to carry away matters of ornament, as ornamental marble chimney-pieces, pier-glasses, hangings, wainscot fixed only by screws, and the like. *Beck v. Rebow*, 1 P. Wms. 94; *Ex parte Quincey*, 1 Atk. 477, and *Lawton v. Lawton*, 3 Atk. 13. But no adjudged case has yet gone the length of establishing that buildings subservient to purposes of agriculture, as distinguished from those of trade, have been removable by an executor of tenant for life, nor by the tenant himself who built them during his term.

In deciding whether a particular fixed instrument, machine, or even building should be considered as removable by the executor, as between him and the heir, the court, in the three principal cases on this subject (viz. *Lawton v. Lawton*, 3 Atk. 13, which was the case of a fire-engine to work a colliery erected by tenant for life; *Lord Dudley and Lord Ward*, Ambler, 113, which was also the case of a fire-engine to work a colliery erected by tenant for life, — these two cases before Lord Hardwicke, — and *Lawton, Executor, v. Salmon*, E. 22, G. 3; 1 H. Blac. 259, *in notis*, before Lord Mansfield, which was the case of salt pans, and which came on in the shape of an action of trover brought for the salt pans by the executor against the tenant of the heir at law), the court may be considered as having decided mainly on this ground, that where the fixed instrument, engine, or utensil (and the building covering the same falls within the same principle), was an accessory to a matter of a personal nature, that it should be itself considered as personalty. The fire-engine, in the cases in 3 Atk. and Ambler, was an accessory to the carrying on the trade of getting and vending coals; a matter of a personal nature. Lord Hardwicke says, in the case in Ambler, “A colliery is not only an enjoyment of the estate, but in part carrying on a trade.” And in the case in 3 Atk. he says, “One reason that weighs with me is its being a mixed case, between enjoying the profits of the lands, and carrying on a species of trade; and considering it in this light, it comes very near the instances in brew-houses, &c., of furnaces and coppers.” Upon the same principle Lord Ch. B. Comyns may be considered as having decided the case of the cider-mill; *i. e.*, as a mixed case between enjoying the profits of the land and carrying on a species of trade; and as considering the cider-mill as properly an accessory to the trade of making cider.

In the case of the salt pans, Lord Mansfield does not seem to have considered them as accessory to the carrying on a trade, but as merely the means of enjoying the benefit of the inheritance. He says, “The

salt spring is a valuable inheritance, but no profit arises from it unless there be a salt work ; which consists of a building, &c., for the purpose of containing the pans, &c., which are fixed to the ground. The inheritance cannot be enjoyed without them. They are accessories necessary to the enjoyment of the principal. The owner erected them for the benefit of the inheritance." Upon this principle he considered them as belonging to the heir, as parcel of the inheritance, for the enjoyment of which they were made, and not as belonging to the executor, as the means or instrument of carrying on a trade. If, however, he had even considered them as belonging to the executor, as utensils of trade, or as being removable by the tenant, on the ground of their being such utensils of trade ; still it would not have affected the question now before the court, which is the right of a tenant for mere agricultural purposes to remove buildings fixed to the freehold, which were constructed by him for the ordinary purposes of husbandry, and connected with no description of trade whatsoever : and to which description of buildings no case (except the *Nisi Prius* case of *Dean v. Allaly*, before Lord Kenyon, and which did not undergo the subsequent review of himself and the rest of the court) has yet extended the indulgence allowed to tenants in respect to buildings for the purposes of trade. In the case in Buller's *Nisi Prius*, 34, of *Culling v. Truffnell*, before Ch. J. Treby, at *Nisi Prius*, he is stated to have holden that the tenant who had erected a barn upon the premises, and put it upon pattens and blocks of timber lying upon the ground, but not fixed in or to the ground, might by the custom of the country take them away at the end of his term. To be sure he might, and that without any custom ; for the terms of the statement exclude them from being considered as fixtures : " they were not fixed in or to the ground." In the case of *Fitzherbert v. Shaw*, 1 H. Blac. 258, we have only the opinion of a very learned judge indeed, Mr. Justice Gould, of what would have been the right of the tenant, as to the taking away a shed built on brick-work, and some posts and rails which he had erected, if the tenant had done so during the term ; but as the term was put an end to by a new contract, the question what the tenant could have done in virtue of his right under the old term, if it had continued, could never have come judicially before him at *Nisi Prius* ; and when that question was offered to be argued in the court above, the counsel were stopped, as the question was excluded by the new agreement. As to the case of *Penton v. Robart*, 2 East, 88, it was the case of a varnish house, with a brick foundation let into the ground, of which the wood-work had been removed from another place, where the defendant had carried on his trade with it. It was a building for the purpose of trade ; and the tenant was entitled to the same indulgence in that case, which, in the cases already considered, had been allowed to other buildings for the purposes of trade ; as furnaces, vats, coppers, engines, and the like. And though Lord Kenyon, after putting the case upon the ground of the leaning which obtains in modern times in favor of the interests of trade ; upon which ground it might be properly sup-

ported; goes further, and extends the indulgence of the law to the erection of green-houses and hot-houses by nurserymen, and indeed by implication to buildings by all other tenants of land; there certainly exists no decided case, and, I believe, no recognized opinion or practice on either side of Westminster Hall to warrant such an extension. The *Nisi Prius* case of *Dean v. Allaly* (reported in Mr. Woodfall's book, p. 207, and Mr. Espinasse's, 2 vol. 11), is a case of the erection and removal by the tenant of two sheds, called Dutch barns, which were, I will assume, unquestionably fixtures. Lord Kenyon says, "The law will make the most favorable construction for the tenant, where he has made necessary and useful erections, for the benefit of his trade or manufacture, and which enable him to carry it on with more advantage. It has been so holden in the case of cider-mills, and other cases; and I shall not narrow the law, but hold erections of this sort made for the benefit of trade, or constructed as the present, to be removable at the end of the term." Lord Kenyon here uniformly mentions the benefit of trade, as if it were a building subservient to some purposes of trade; and never mentions agriculture, for the purposes of which it was erected. He certainly seems, however, to have thought that buildings erected by tenants for the purposes of farming, were, or rather ought to be, governed by the same rules which had been so long judicially holden to apply in the case of buildings for the purposes of trade. But the case of buildings for trade has been always put and recognized as a known, allowed, exception from the general rule, which obtains as to other buildings; and the circumstance of its being so treated and considered establishes the existence of the general rule to which it is considered as an exception. To hold otherwise, and to extend the rule in favor of tenants in the latitude contended for by the defendant, would be, as appears to me, to introduce a dangerous innovation into the relative state of rights and interests holden to subsist between landlords and tenants. But its danger or probable mischief is not so properly a consideration for a court of law, as whether the adoption of such a doctrine would be an innovation at all; and, being of opinion that it would be so, and contrary to the uniform current of legal authorities on the subject, we feel ourselves, in conformity to, and in support of those authorities, obliged to pronounce that the defendant had no right to take away the erections stated and described in this case.

Vaughan, Serjeant, and *Torkington*, for the plaintiff.

Balguy and *Clarke*, for the defendant.

*Postea to the plaintiff.*¹

¹ The subject considered in this case is now regulated in England by the Landlord and Tenant Act (14 & 15 Vict. c. 25), and the Agricultural Holdings Act (46 & 47 Vict. c. 61).

BUCKLAND v. BUTTERFIELD.

COMMON PLEAS. 1820.

[Reported 2 Brod. & B. 54.]

ACTION on the case, in the nature of waste, by tenant for life, aged 70, against the assignees of her lessee from year to year, who had become bankrupt. The bankrupt was the son of the plaintiff, and had also a remainder for life in the premises after her death. At Buckingham Lent Assizes, 1820, before *Graham, B.*, the case proved was, that the defendants had taken away from the premises let to the bankrupt a conservatory and a pinery. The conservatory, which had been purchased by the bankrupt and brought from a distance, was by him erected on a brick foundation fifteen inches deep: upon that was bedded a sill, over which was framework covered with slate; the framework was eight or nine feet high at the end, and about two in front. This conservatory was attached to the dwelling-house by eight cantilivers let nine inches into the wall, which cantilivers supported the rafters of the conservatory. Resting on the cantilivers was a balcony with iron rails. The conservatory was constructed with sliding glasses, paved with Portland stone, and connected with the parlor chimney by a flue. Two windows were opened from the dwelling-house into the conservatory, one out of the dining-room, another out of the library. A folding-door was also opened into the balcony; so that when the conservatory was pulled down, that side of the house, to which it had been attached, became exposed to the weather. Surveyors who were called, stated that the house was worth £50 a year less after the conservatory and pinery had been removed. The learned judge having stated his opinion that the plaintiff ought to recover at least for the pinery, and probably for the conservatory, the jury, estimating the plaintiff's life at six years' purchase, gave a verdict for her, £300 damages. *Peake, Serjt.*, having obtained a rule *nisi* for a new trial,

Blosset, Serjt., showed cause against the rule.

Peake, in support of the rule.

DALLAS, C. J. This was an action on the case, tried before *Graham, B.*, at the last Aylesbury Assizes. The question in the cause, as far as relates to the motion now before us, was, whether a conservatory affixed to the house in the manner specified in the report was so affixed as to be an annexation to the freehold, and to make the removal of it waste? In *Elwes v. Maw* will be found at length all that can relate to this case and to all cases of a similar description. It is not necessary to go into the distinctions there pointed out, as they relate to different classes of persons, or to the subject-matter itself of the inquiry. Nothing will, here, depend on the relation in which the parties stood to each other, or the distinction between trade and agricul-

ture ; for this is merely the case of an ornamental building constructed by the party for his pleasure, and the question of annexation arises on the facts reported to us ; and I say the facts reported, because every case of this sort must depend on its special and peculiar circumstances. On the one hand it is clear, that many things of an ornamental nature may be in a degree affixed, and yet, during the term, may be removed ; and, on the other hand, it is equally clear, that there may be that sort of fixing or annexation, which, though the building or thing annexed may have been merely for ornament, will yet make the removal of it waste. The general rule is, that where a lessee, having annexed a personal chattel to the freehold during his term, afterwards takes it away, it is waste. In the progress of time this rule has been relaxed, and many exceptions have been grafted upon it. One has been in favor of matters of ornament, as ornamental chimney-pieces, pier-glasses, hangings, wainscot fixed only by screws, and the like. Of all these it is to be observed, that they are exceptions only, and, therefore, though to be fairly considered, not to be extended ; and with respect to one subject in particular, namely, wainscots, Lord Hardwicke treats it as a very strong case. Passing over all that relates to trade and agriculture as not connecting with the present subject, it will be only necessary to advert, as bearing upon it, to the doctrine of Lord Kenyon in 2 East, 88, referred to at the bar. The case itself was that of a building for the purpose of trade, and standing, therefore, upon a different ground from the present, but it has been cited for the *dictum* of Lord Kenyon, which seems to treat green-houses and hot-houses erected by great gardeners and nurserymen as not to be considered as annexed to the freehold. Even if the law were so, which it is not necessary to examine, still, for obvious reasons, such a case would not be similar to the present : but in *Elwes v. Maw*, speaking of this *dictum*, Lord Ellenborough says, there exists no decided case, and, I believe, no recognized opinion or practice on either side of Westminster Hall to warrant such an extension. Allowing, then, that matters of ornament may or may not be removable, and that whether they are so or not must depend on the particular case, we are of opinion that no case has extended the right to remove nearly so far as it would be extended if such right were to be established in the present instance under the facts of the report, to which it will be sufficient to refer ; and, therefore, we agree with the learned judge, in thinking that the building in question must be considered as annexed to the freehold, and the removal of it consequently waste.

*Rule discharged.*¹

¹ See *Jenkins v. Gething*, 2 J. & H. 520 ; *Seeger v. Pettit*, 77 Pa. 437.

GRYMES v. BOWEREN.

COMMON PLEAS. 1830.

[Reported 6 Bing. 437.]

CASE for injury to the reversion. At the trial before *Garrow, B.*, at the last Norfolk Assizes, it appeared that the defendant, who occupied as tenant from year to year certain premises belonging to the plaintiff, had, at his own expense, erected on the premises a pump, which he took away when he quitted them.

The pump was attached to a stout perpendicular plank; this plank rested on the ground at one end, and at the other was fastened by an iron bolt or pin to an adjacent wall, from which it was distant about four inches. The pin, which had a head at one end and a screw at the other, passed entirely through the wall.

The tube of the pump passed through a brick flooring into a well beneath. This well had originally been open, but the defendant had arched it over when he erected the pump; and, in withdrawing the tube, four or five of the floor bricks were displaced, but the iron pin which attached the perpendicular plank to the wall was left in the wall when the plank was removed.

Under the direction of the learned Baron (who thought the pump parcel of the freehold, inasmuch as it could not have been the subject of larceny at common law), the jury found a verdict for the plaintiff, damages £4, with leave for the defendant to move to enter a nonsuit.

Wilde, Serjt., having obtained a rule *nisi* accordingly,

Storks, Serjt., now showed cause.

Wilde, contra.

TINDAL, C. J. It is difficult to draw any very general and at the same time precise and accurate rule on this subject; for we must be guided in a great degree by the circumstances of each case, the nature of the article, and the mode in which it is fixed. The pump, as it is described to have been fixed in this case, appears to me to fall within the class of removable fixtures. The rule has always been more relaxed as between landlord and tenant, than as between persons standing in other relations. It has been holden that stoves are removable during the term; grates, ornamental chimney-pieces, wainscots fastened with screws, coppers, and various other articles: and the circumstance that, upon a change of occupiers, articles of this sort are usually allowed by landlords to be paid for by the in-coming to the out-going tenant, is confirmatory of this view of the question.

Looking at the facts of this case; considering that the article in dispute was one of domestic convenience; that it was slightly fixed; was erected by the tenant; could be moved entire; and that the question is

between the tenant and his landlord, — I think the rule should be made absolute.

PARK, J. The rules with regard to property of this description vary according to the relation in which parties stand towards each other. The rule as between heir and executor is more strict than as between landlord and tenant, and even as between landlord and tenant it has been relaxed in modern times; for in *Lawton v. Lawton*, 3 Atk. 13, Lord Hardwicke held, that wainscot might be removed by the tenant, although it would have been waste to have removed it in the time of Hen. 7.

Perhaps we ought not to look with too much nicety as to the mode in which articles are fixed, when it has been holden that the tenant may remove ovens, coppers, and the like. The present case, however, is clearly distinguishable from *Buckland v. Butterfield*, where a conservatory was deeply fixed in the soil, and formed part of the house to which it was attached; and, however I may regret it, seeing that the value in dispute is so small, I am compelled to say that the verdict which has been given is wrong.

GASELEE, J., concurred.

BOSANQUET, J. I am of opinion, that this pump was removable by the tenant. Whether property of this kind be removable or not, depends in some degree on the relation between the parties: and in the relation of landlord and tenant the rule is less strict than in others: it is more so as between heir and executor, and as between executor and remainder-man. My apprehension has been lest we should be thought to lay down any principle which would apply to cases different from the present. But considering that this is a case between landlord and tenant; that the pump was erected by the tenant; that it is an article of domestic use; and can be removed entire, I think the verdict ought to be set aside.

Rule absolute.

WHITEHEAD v. BENNETT.

CHANCERY. 1858.

[*Reported 27 L. J. Ch. 474.*]

THIS suit was instituted for the administration of the estate of W. Barker. A portion of the property consisted of certain plots of land near Manchester, upon which there was a building that had been used as a lunatic asylum. The receiver who had been appointed by the court, entered into an agreement, dated the 19th of September, 1852, with W. Ireland, whereby it was agreed that a lease of the buildings and premises should be granted to W. Ireland for the term of twenty-one years, at a rent of £42 per annum, with a covenant on the part of the said W. Ireland to repair the premises. Under this agreement

Ireland took possession of the premises, and converted the building thereon into a cotton-mill, and he also erected on the land a bleaching-house, a drying-stove, a dye-house, an engine-house, and a lime-house, and also a building erected upon cross beams, resting upon two walls and forming a passage. A dispute afterwards arose as to the terms of the lease, and the lessee claimed a right to remove the buildings which he had erected, on the ground that they were trade fixtures, used for the purpose of his business. An injunction was obtained to restrain the removal of the buildings; and upon a reference to chambers, evidence was obtained as to the nature of the buildings, and from the report of a gentleman competent in such matters, who had been sent down by the court to examine the premises, it appeared that the various buildings erected by the lessee were made of brick, with brick foundations let into the soil to the depth of from five inches to five feet. The question now came on upon an adjournment from chambers, as to the right of the tenant to remove the buildings.

Mr. Eddis, appeared for *W. Ireland*, the tenant.

Mr. Karlake, for the trustees; and

Mr. Bazalgette, for other parties in the suit.

KINDERSLEY, V. C. My opinion is, that these are not trade buildings, removable at the pleasure of the tradesman. It is extremely difficult to come to a conclusion upon the authorities as to any principle which can be safely enunciated. I have carefully considered the subject as to the possibility of deducing any rule from the cases cited, but have been unable to do so. Still there are, no doubt, general principles upon which these cases are founded. In the first place, the question has arisen between the executor and the heir; and, secondly, between the tenant for life and the remainderman; and, lastly, between the landlord and tenant. Again, there have been different views taken by the court with reference to agricultural buildings, trade buildings, and the ordinary fixtures which a tenant puts in for his own convenience. In this case the most favorable instance arises, namely, the right of removal as between landlord and tenant; and, moreover, the things sought to be removed are of the most favorable character, as being trade fixtures in the sense that they are buildings erected for the exclusive purposes of trade. With respect to anything in the nature of machinery, engines, or plant, or things substantial and solid, such as vats, utensils, &c., these are all clearly within the right of removal as between landlord and tenant. In all these cases, the things sought to be removed might either be taken away bodily, where they are capable of being set up again elsewhere, or if, by reason of their bulk or complexity, it should be necessary to take them to pieces, they could be put together in the same form in some other place. There is no dispute about the right of the tenant to remove such fixtures when they retain the general character of trade fixtures. Take the case, for instance, of a large steam-engine, which it is impossible to remove in its integral condition, yet the right of removal will apply to such an article,

notwithstanding that you must take it to pieces. It certainly may be metaphysically argued from this, that a building of the most substantial and solid character, let ten feet into the ground, with cement, is capable of removal, brick by brick, and of being put together in another place in the same form; but the common-sense of mankind would determine that an engine is a very different thing from a house, although every stone, brick, tile, and chimney-pot might be removed; one, however, is the case of removal of materials, and the other of taking to pieces and restoring to their former state, actual portions of the engine. It would be impossible to admit the validity of such an argument without laying down a rule never intended to be enunciated, and which would alter the broad distinction between trade fixtures and buildings used in trade. Suppose the case of a building or utensil which, by the rule of law, a tenant might remove as a trade fixture, if there is anything which is a mere accessory or adjunct to it, and has no other existence or purpose, then if you may remove the principal thing, you may also remove the accessory. Among the many cases upon this subject, there is not one which has determined that even in the most favorable circumstance of landlord and tenant, a tenant has a right to remove any building which he has erected, merely because it is used only for the purpose of trade; and if the argument used in this case is allowed to prevail, it can only do so in such a manner as may be followed up to its legitimate consequences, and it would be laying down a rule that whatever a tradesman erected, however substantial, and however firmly let into the freehold, yet if the identity is preserved, the tenant might remove it. Such a rule is established nowhere. Not only is there no such decision, but there is not even a *dictum* that can bear any such construction. The strongest authority is the case of *Elwes v. Maw*, which was a case of agricultural fixtures, and certainly in that case there are *dicta* which appear distinct at first sight, and if it could be found that Lord Ellenborough ever laid down such a rule of law as that which has been contended for in this case on behalf of Mr. Ireland, I should gladly have followed it; but I can find no such decision. It is evident that those *dicta* refer only to the particular case in question. Assuming, then, that these buildings were erected solely for the purposes of trade, has the tenant a right to remove them? and are they capable of removal? There is no law, practice, or authority, having regard to the nature of these buildings, to justify the court in saying that they come within the description of trade fixtures so as to bring them within the cases cited. If they are to be so considered, it would be laying down a very alarming rule, not only generally, but particularly with respect to that district of the North of England, in Lancashire and Yorkshire, where the most valuable structures, involving enormous expense, and constituting the whole value of the land, are built for the sole purpose of trade. No doubt great favor has been shown, and should always be shown, towards trade, and the modern cases have relaxed the rigor of the old authorities in this respect; but

some limit must be put to this indulgence, and the cases seem to me to have gone quite as far as they ought to go. The question, then, turns upon the nature of these particular buildings. With respect to that which is erected upon the walls forming a passage, it is incapable of being removed in an integral condition, and the same observation applies to the engine-house, although it may in some sense be called an accessory to the engine. But it is not a mere shed; on the contrary, it is a brick building, let into the soil. Take the common case of those gigantic buildings which are raised story after story, fitted with spinning-jennies, drums, wheels, &c., which can only be used in such a building. It is clear, *ex concessis*, that you might remove the machinery, or the engine, however large, which is usually in the lower portion, and which works the whole machinery; but if the argument as to accessories were carried out, you might allow the entire building to be removed, and it is impossible to see where such a doctrine would stop. The present case is precisely the same on a smaller scale; and with respect to all and each of these buildings, my opinion is, that they cannot be brought within the proper legal definition of trade fixtures, removable by the tenant.

DOTY v. GORHAM.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1827.

[Reported 5 Pick. 487.]

THIS was an action of trespass, in which the plaintiff alleged that the defendants entered his close, destroyed his fence, and removed a shop which was his property. The defendants pleaded the general issue, and that the shop was the property of Gorham, which stood upon the close by the plaintiff's permission, and that Gorham, and the other defendants as his servants, entered the close and removed the shop, doing to the plaintiff as little injury as possible. The plaintiff traversed the allegation of property in Gorham, upon which issue was joined.

At the trial, before *Morton, J.*, the defendants produced evidence tending to show, that formerly the shop was the property of one Coombs, and that he moved it on the *locus in quo* and occupied it there by the plaintiff's permission. They then produced a judgment and execution in favor of one Haskell against Coombs, and also the levy of this execution upon the shop, and the regular sale of the shop to Gorham by Bassett, one of the defendants, as a constable. No evidence of the appointment and qualification of Bassett was produced, and for this reason the plaintiff's counsel objected to the admission of the execution and Bassett's return upon it. But the objection was overruled; and the jury were instructed, that if the shop was the

property of Coombs, and he placed and continued it upon the plaintiff's close by his permission, and the property was legally transferred to Gorham, then Gorham had a right to enter with necessary aid upon the plaintiff's close and remove the shop, doing as little damage as possible by the entry and removal. To this direction the plaintiff excepted.

The jury returned a verdict for the defendants; but if the execution and return were improperly admitted, or if the foregoing instruction was erroneous, a new trial was to be granted; otherwise judgment was to be rendered upon the verdict.

Wood, for the plaintiff.

Holmes, Jr., contra.

MORTON, J. delivered the opinion of the Court. The shop was a chattel liable to attachment and seizure, and Gorham, the principal defendant, acquired a good title to it by his purchase under the constable's sale on the execution. The only objection to the validity of the sale is, that it was not proved on the trial, that the person who made it was legally elected and qualified to act as constable. It would be productive of great inconvenience to require purchasers at officers' sales to inquire into the regularity of the appointments and qualifications of those assuming to act as such. Titles acquired under the proceedings of sheriffs and constables, cannot be made to depend upon the purchasers' ability to prove that they were officers *de jure* as well as *de facto*. *Fowler v. Bebee*, 9 Mass. R. 231; 15 Mass. R. 170; *Ibid.* 180; [Rand's ed. 183, n. a;] 5 Barn. & Ald. 243. The fact that one of the defendants, who acted as the servant of the purchaser, was the officer who made the sale, can make no difference in the application of this principle. He cannot be holden to prove his title to his office in an action in which no complaint is made against him for any official act.

The defendant Gorham having shown a valid title to the shop, the only question remaining is, whether he had a right to enter upon the plaintiff's close and remove it. The act was a trespass, unless such right may be inferred from the facts in the case.

Coombs, the debtor, having placed the shop upon the plaintiff's soil by his permission, was tenant at will of the land on which it stood. He had not only a right in the soil covered by the building, but also a right of ingress and egress over the plaintiff's close to and from the highway, as necessary to the enjoyment of the shop. There is no evidence of the determination of this tenancy at will. The shop being erected for the purposes of trade, the tenant had a right to remove it at any time during the continuance of the estate. *Elves v. Maw*, 3 East, 52. And had the landlord determined the estate, the tenant would have been entitled to sufficient time to remove his shop and other property. *Rising v. Stannard*, 17 Mass. R. 282; *Ellis v. Paige*, 1 Pick. 43. The debtor, therefore, might rightfully have removed the shop while he continued to own it; and Gorham having acquired his

property in the building and his right to the enjoyment of the soil, was guilty of no trespass in entering with the other defendants as his servants, and removing the shop.

*Judgment according to verdict.*¹

VAN NESS v. PACARD.

SUPREME COURT OF THE UNITED STATES. 1829.

[*Reported 2 Pet. 137.*]

MR. JUSTICE STORY delivered the opinion of the court.²

This is a writ of error to the Circuit Court of the District of Columbia, sitting for the county of Washington.

The original was an action on the case brought by the plaintiffs in error against the defendant, for waste committed by him, while tenant of the plaintiffs, to their reversionary interest, by pulling down and removing from the demised premises a messuage or dwelling-house erected thereon and attached to the freehold. The cause was tried upon the general issue, and a verdict found for the defendant, upon which a judgment passed in his favor; and the object of the present writ of error is to revise that judgment.

By the bill of exceptions filed at the trial it appeared that the plaintiffs, in 1820, demised to the defendant, for seven years, a vacant lot in the city of Washington, at the yearly rent of \$112.50, with a clause in the lease that the defendant should have a right to purchase the same at any time during the term for \$1,875. After the defendant had taken possession of the lot, he erected thereon a wooden dwelling-house, two stories high in front, with a shed of one story, a cellar of stone or brick foundation, and a brick chimney. The defendant and his family dwelt in the house from its erection until near the expiration of the lease, when he took the same down, and removed all the materials from the lot. The defendant was a carpenter by trade; and he gave evidence that, upon obtaining the lease, he erected the building above mentioned, with a view to carry on the business of a dairyman, and for the residence of his family and servants engaged in his said business; and that the cellar, in which there was a spring, was made and exclusively used for a milk cellar, in which the utensils of his said business were kept and scalded, and washed and used; and that feed

¹ "As between landlord and tenant, or one in temporary possession of lands under any agreement whatever for the use of the same, the law is extremely indulgent to the latter with respect to the fixtures annexed for a purpose connected with such temporary possession." — BROWN, J., in *Wiggins Ferry Co. v. O. & M. Ry.*, 142 U. S. 396, 415.

See *Mott v. Palmer*, 1 Comst. 564.

² The opinion only is printed; it states the case.

was kept in the upper part of the house, which was also occupied as a dwelling for his family. That the defendant had his tools as a carpenter, and two apprentices in the house, and a work-bench out of doors; and carpenter's work was done in the house, which was in a rough unfinished state, and made partly of old materials. That he also erected on the lot a stable for his cows, of plank and timber, fixed upon posts fastened into the ground, which stable he removed with the house, before the expiration of his lease.

Upon this evidence, the counsel for the plaintiffs prayed for an instruction, that if the jury should believe the same to be true, the defendant was not justified in removing the said house from the premises; and that he was liable to the plaintiffs in this action. This instruction the court refused to give; and the refusal constitutes his first exception.

The defendant further offered evidence to prove, that a usage and custom existed in the city of Washington, which authorized a tenant to remove any building which he might erect upon rented premises, provided he did it before the expiration of the term. The plaintiffs objected to this evidence; but the court admitted it. This constitutes the second exception.

Testimony was then introduced on this point, and after the examination of the witnesses for the defendant, the plaintiffs prayed the court to instruct the jury that the evidence was not competent to establish the fact that a general usage had existed or did exist in the city of Washington, which authorized a tenant to remove such a house as that erected by the tenant in this case; nor was it competent for the jury to infer from the said evidence that such a usage had existed. The court refused to give this instruction, and this constitutes the third exception.

The counsel for the plaintiffs then introduced witnesses to disprove the usage; and after their testimony was given, he prayed the court to instruct the jury, that upon the evidence given as aforesaid in this case, it is not competent for them to find a usage or custom of the place by which the defendant could be justified in removing the house in question; and there being no such usage, the plaintiffs are entitled to a verdict for the value of the house which the defendant pulled down and destroyed. The court was divided, and did not give the instruction so prayed; and this constitutes the fourth exception.

The first exception raises the important question, What fixtures erected by a tenant during his term are removable by him?

The general rule of the common law certainly is, that whatever is once annexed to the freehold becomes part of it, and cannot afterwards be removed, except by him who is entitled to the inheritance. The rule, however, never was, at least as far back as we can trace it in the books, inflexible, and without exceptions. It was construed most strictly between executor and heir in favor of the latter; more liberally between tenant for life or in tail, and remainder-man or reversioner, in favor of the former; and with much greater latitude between landlord

and tenant, in favor of the tenant. But an exception of a much broader cast, and whose origin may be traced almost as high as the rule itself, is of fixtures erected for the purposes of trade. Upon principles of public policy, and to encourage trade and manufactures, fixtures which were erected to carry on such business were allowed to be removed by the tenant during his term, and were deemed personalty for many other purposes. The principal cases are collected and reviewed by Lord Ellenborough in delivering the opinion of the court in *Elwes v. Maw*, 3 East's R. 38; and it seems unnecessary to do more than to refer to that case for a full summary of the general doctrine, and its admitted exceptions in England. The court there decided, that in the case of landlord and tenant, there had been no relaxation of the general rule in cases of erections; solely for agricultural purposes, however beneficial or important they might be as improvements of the estate. Being once annexed to the freehold by the tenant, they became a part of the realty, and could never afterwards be severed by the tenant. The distinction is certainly a nice one between fixtures for the purposes of trade, and fixtures for agricultural purposes; at least in those cases where the sale of the produce constitutes the principal object of the tenant, and the erections are for the purpose of such a beneficial enjoyment of the estate. But that point is not now before us; and it is unnecessary to consider what the true doctrine is, or ought to be, on this subject. However well settled it may now be in England, it cannot escape remark, that learned judges at different periods in that country have entertained different opinions upon it, down to the very date of the decision in *Elwes v. Maw*, 3 East's R. 38.

The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation. There could be little or no reason for doubting that the general doctrine as to things annexed to the freehold, so far as it respects heirs and executors, was adopted by them. The question could arise only between different claimants under the same ancestor, and no general policy could be subserved by withdrawing from the heir those things which his ancestor had chosen to leave annexed to the inheritance. But between landlord and tenant it is not so clear that the rigid rule of the common law, at least as it is expounded in 3 East, 38, was so applicable to their situation as to give rise to necessary presumption in its favor. The country was a wilderness, and the universal policy was to procure its cultivation and improvement. The owner of the soil, as well as the public, had every motive to encourage the tenant to devote himself to agriculture, and to favor any erections which should aid this result; yet, in the comparative poverty of the country, what tenant could afford to erect fixtures of much expense or value, if he was to lose his whole interest therein by the very act of erection? His cabin or log-hut, however necessary for any improvement of the

soil, would cease to be his the moment it was finished. It might therefore deserve consideration whether, in case the doctrine were not previously adopted in a State by some authoritative practice or adjudication, it ought to be assumed by this court as a part of the jurisprudence of such State, upon the mere footing of its existence in the common law. At present, it is unnecessary to say more than that we give no opinion on this question. The case which has been argued at the bar may well be disposed of without any discussion of it.

It has been already stated that the exception of buildings and other fixtures, for the purpose of carrying on a trade or manufacture, is of very ancient date, and was recognized almost as early as the rule itself. The very point was decided in 20 Henry VII. 13 a and b, where it was laid down, that if a lessee for years made a furnace for his advantage, or a dyer made his vats or vessels to occupy his occupation, during the term, he may afterwards remove them. That doctrine was recognized by Lord Holt, in *Poole's Case*, 1 Salk. 368, in favor of a soap-boiler who was tenant for years. He held that the party might well remove the vats he set up in relation to trade; and that he might do it by the common law (and not by virtue of any custom), in favor of trade, and to encourage industry. In *Lawton v. Lawton*, 3 Atk. R. 13, the same doctrine was held in the case of a fire-engine, set up to work a colliery by a tenant for life. Lord Hardwicke there said, that since the time of Henry the Seventh, the general ground the courts have gone upon of relaxing the strict construction of law is, that it is for the benefit of the public to encourage tenants for life to do what is advantageous to the estate during the term. He added, "One reason which weighs with me is, its being a mixed case, between enjoying the profits of the land, and carrying on a species of trade; and in considering it in this light, it comes very near the instances in brewhouses, &c., of furnaces and coppers." The case, too, of a cider-mill, between the executor and heir, &c., is extremely strong; for, though cider is a part of the profits of the real estate, yet it was held by Lord Chief Baron Comyns, a very able common lawyer, that the cider-mill was personal estate notwithstanding, and that it should go to the executor. "It does not differ it, in my opinion, whether the shed be made of brick or wood, for it is only intended to cover it from the weather and other inconveniences." In *Penton v. Robart*, 2 East, 88, it was further decided that a tenant might remove his fixtures for trade, even after the expiration of his term, if he yet remained in possession; and Lord Kenyon recognized the doctrine in its most liberal extent.

It has been suggested at the bar that this exception in favor of trade has never been applied to cases like that before the court, where a large house has been built and used in part as a family residence. But the question, whether removable or not, does not depend upon the form or size of the building, whether it has a brick foundation or not, or is one or two stories high, or has a brick or other chimney. The sole

question is, whether it is designed for purposes of trade or not. A tenant may erect a large as well as a small messuage, or a soap-boilery of one or two stories high, and on whatever foundations he may choose. In *Lawton v. Lawton*, 3 Atk. R. 13, Lord Hardwicke said (as we have already seen), that it made no difference whether the shed of the engine be made of brick or stone. In *Penton v. Robart*, 2 East's R. 88, the building had a brick foundation, let into the ground, with a chimney belonging to it, upon which there was a superstructure of wood. Yet the court thought the building removable. In *Elwes v. Maw*, 3 East's R. 38, Lord Ellenborough expressly stated, that there was no difference between the building covering any fixed engine, utensils, and the latter. The only point is, whether it is accessory to carrying on the trade or not. If *bona fide* intended for this purpose, it falls within the exception in favor of trade. The case of the Dutch barns, before Lord Kenyon (*Dean v. Allalley*, 3 Esp. Rep. 11; Woodfall's Landlord and Tenant, 219), is to the same effect.

Then as to the residence of the family in the house, this resolves itself into the same consideration. If the house were built principally for a dwelling-house for the family, independently of carrying on the trade, then it would doubtless be deemed a fixture, falling under the general rule, and immovable. But if the residence of the family were merely an accessory for the more beneficial exercise of the trade, and with a view to superior accommodation in this particular, then it is within the exception. There are many trades which cannot be carried on well without the presence of many persons by night as well as by day. It is so in some valuable manufactories. It is not unusual for persons employed in a bakery to sleep in the same building. Now what was the evidence in the present case? It was "that the defendant erected the building before mentioned, with a view to carry on the business of a dairyman, and for the residence of his family and servants engaged in that business." The residence of the family was then auxiliary to the dairy; it was for the accommodation and beneficial operations of this trade.

Surely, it cannot be doubted, that in a business of this nature, the immediate presence of the family and servants was, or might be, of very great utility and importance. The defendant was also a carpenter, and carried on his business, as such, in the same building. It is no objection that he carried on two trades instead of one. There is not the slightest evidence of this one being a mere cover or evasion to conceal another, which was the principal design; and, unless we were prepared to say (which we are not) that the mere fact that the house was used for a dwelling-house, as well as for a trade, superseded the exception in favor of the latter, there is no ground to declare that the tenant was not entitled to remove it. At most, it would be deemed only a mixed case, analogous in principle to those before Lord Chief Baron Comyns and Lord Hardwicke, and therefore entitled to the benefit of the exception. The case of *Holmes v. Tremper*, 20 Johns. R.

29, proceeds upon principles equally liberal; and it is quite certain that the Supreme Court of New York were not prepared at that time to adopt the doctrine of *Elwes v. Maw*, in respect to erections for agricultural purposes. In our opinion, the Circuit Court was right in refusing the first instruction.

The second exception proceeds upon the ground that it was not competent to establish a usage and custom in the city of Washington for tenants to make such removals of buildings during their term. We can perceive no objection to such proof. Every demise between landlord and tenant in respect to matters in which the parties are silent, may be fairly open to explanation by the general usage and custom of the country or of the district where the land lies. Every person under such circumstances is supposed to be conversant of the custom, and to contract with a tacit reference to it. Cases of this sort are familiar in the books; as, for instance, to prove the right of a tenant to an away-going crop. 2 Starkie on Evidence, Part IV. p. 453. In the very class of cases now before the court the custom of the country has been admitted to decide the right of the tenant to remove fixtures. Woodfall's Landlord and Tenant, 218. The case before Lord Chief Justice Treby turned upon that point. Buller's Nisi Prius, 34.

The third exception turns upon the consideration, whether the parol testimony was competent to establish such a usage and custom. Competent it certainly was, if by competent is meant that it was admissible to go to the jury. Whether it was such as ought to have satisfied their minds on the matter of fact, was solely for their consideration, — open indeed to such commentary and observation as the court might think proper in its discretion to lay before them for their aid and guidance. We cannot say that they were not at liberty, by the principles of law, to infer from the evidence the existence of the usage. The evidence might be somewhat loose and indeterminate, and so be urged with more or less effect upon their judgment; but in a legal sense it was within their own province to weigh it as proof or as usage.

The last exception professes to call upon the court to institute a comparison between the testimony introduced by the plaintiff and that introduced by the defendant against and for the usage. It requires from the court a decision upon its relative weight and credibility, which the court were not justified in giving to the jury in the shape of a positive instruction.

Upon the whole, in our judgment, there is no error in the judgment of the Circuit Court; and it is affirmed, with costs.¹

¹ See *Cannon v. Hare*, 1 Tenn. Ch. 22, 36; *Brown v. Reno Elec. Lt. Co.*, 55 Fed. R. 229.

COLLAMORE v. GILLIS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1889.

[Reported 149 Mass. 578.]

TORT for the removal of an oven from a bakery belonging to the plaintiff. Trial in the Superior Court, without a jury, before *Lathrop, J.*, who found for the defendant, and reported the case for the determination of this court, as follows.

The plaintiff made a lease of the bakery to one Webster for the term of nine years from July 1, 1881, the lease providing that "all future erections and additions to or upon" the demised premises should be delivered up to the lessor at the termination of the lease.¹ The defendant was the assignee from Webster of the lease, and occupied the premises from August 17, 1887, till January 19, 1888, and paid rent to the plaintiff. At the date of the lease the premises had for a long period been used as a bakery, and such use continued up to January 19, 1888. Besides two baker's ovens already in the basement, Webster in 1884 erected another in the basement in the following manner. There was an overhead chimney extending down several feet into the cellar from the floor above, built into and against the cellar wall. There was a portable furnace with a smoke pipe running into the flue of this chimney, which was removed by him. The cellar bottom was of brick with a covering of cement. Without removing the cellar floor, an oven was built upon it against the cellar wall. This oven consisted of eleven or twelve thousand bricks set in mortar to hold the same, and an iron interior and door. The brickwork was "tied in" to the cellar wall as follows: two slots, about two and a half feet long, six inches wide, and four inches deep, were cut into the cellar wall, and the masonry of the oven was built into said slots, so as to "tie" the oven to the cellar wall. About two feet and a half of the bottom of the overhead chimney was cut away, leaving the flue exposed, and the

¹ "The right of a tenant to remove trade fixtures may doubtless be qualified by the covenants in the lease. But we are of opinion that the covenant to deliver up in good order 'all future erections or additions' to or upon the premises is limited, in purpose and effect, to new buildings erected or old buildings added to — putting such erections and additions upon the same footing, in respect of the obligation to keep in repair, as the buildings upon the premises at the time of the execution of the lease; and cannot be extended so as to deprive the tenants of the right to remove trade fixtures, much less personal property, put by them upon the premises during the term. *Bishop v. Elliott*, 11 Exch. 113. In *Naylor v. Collinge*, 1 Taunt. 19, the things removed were 'buildings,' coming within the very words of the covenant; and yet such of them only as were affixed to the freehold, and not such as rested upon blocks, were held to be included. In all the other cases cited for the plaintiff upon this point, the covenant either expressly named the fixtures or comprised 'all improvements.'" GRAY, C. J., in *Holbrook v. Chamberlin*, 116 Mass. 155, 162.

The rule as to trade fixtures does not apply between mortgagor and mortgagee. *Walmsley v. Milne*, 7 C. B. (N. S.) 115.

oven was built up thereto, so that the flue or smoke vent of the oven became continuous with the flue of the chimney, and each alternate layer or course of the brick of the oven was lapped into the brick of the chimney, so as to make the chimney and oven continuous. A trench, about one foot deep and several feet wide and long, was dug in front of the oven doors. The sides of the trench were banked up with brick to hold the earth back, and the bottom of the trench was concreted. This trench was used to enable the stoker to remove ashes, and it was necessary to the convenient use of the oven.

In December, 1887, during the term of the lease, this oven being then out of repair, the defendant, who had purchased the oven, sold it, and authorized the purchaser to remove it. The purchaser did remove it, and in so doing left the holes or slots in the cellar wall open, and left the chimney about two and a half feet shorter than it was originally, and the chimney flue open at the bottom. The draught of the chimney in the rooms above was thus impaired. The oven was not and could not have been removed intact, but the masonry of which it was composed was knocked down, and the bricks were taken away.

The judge found the value of the oven to the building to be one hundred dollars, aside from a damage of ten dollars to the building from the removal; and that the oven was a trade fixture; and ruled that the plaintiff could not recover for the removal. If, as matter of law, the oven was not a trade fixture, and the plaintiff can recover for the removal of the oven, judgment was to be entered in her favor for one hundred dollars; otherwise, judgment for the defendant.

The case was submitted on briefs to all the judges.

S. J. Elder & F. A. P. Fiske, for the plaintiff.

I. R. Clark & F. Ranney, for the defendant.

C. ALLEN, J. In determining whether an addition made by a tenant to a leased building is removable or not by him during his term, the chief element to be considered is the mode of its annexation, and whether it can be removed without substantial injury to the building or to itself. The intention with which it was put there, though often an element to be considered, is of secondary importance. *Wall v. Hinds*, 4 Gray, 256, 270. *Whiting v. Brastow*, 4 Pick. 310. *Hanrahan v. O'Reilly*, 102 Mass. 201, 203. *Weston v. Weston*, 102 Mass. 514, 519. *Amos & Ferard on Fixtures*, (3d ed.) 7, 65. It is true that machines or structures which cannot be severed without taking them in pieces may nevertheless often be removed. *Antoni v. Belknap*, 102 Mass. 193. In *Penton v. Robart*, 2 East, 88, which is sometimes cited as supporting a broader doctrine, all that was removed by the tenant was a superstructure of wood, which had been brought from another place and put upon a brick foundation let into the ground. He pulled down the wooden superstructure and carried away the materials, but did not undertake to remove the brick foundation, which perhaps was not placed there by him. The case of *Van Ness v. Pacard*, 2 Pet. 137, goes further; but the more recent case of *Kutter v. Smith*,

2 Wall. 491, 497, appears to recognize a narrower rule, though without any extended discussion of the question. *Hill v. Sewald*, 53 Penn. St. 271, follows *Van Ness v. Pacard*, and *White's appeal*, 10 Penn. St. 252, is similar. We are not inclined to extend the right of removal so far as to include a thing which cannot be severed from the realty without being destroyed, or reduced to a mere mass of crude materials.

In the case before us, the oven was not like a machine or a structure, the parts of which are fitted to each other and can be taken apart and put together again at pleasure in some other place. It had, so to speak, no removable identity, but when taken down it necessarily lost its character as an oven, and, with the exception of the iron lining and door, became mere bricks and mortar. When built, it was in the nature of a fixed and permanent structure, which was so united with the building that the two became inseparable without the destruction of the one, and a substantial injury to the other. Under such circumstances, we think the better reason is in favor of holding that the oven was not removable, and this view is more in accordance with the cases which have heretofore arisen in this Commonwealth. This result is also strongly supported by the decision in *Whitehead v. Bennett*, 27 L. J. Ch. 474. The authority of this case, it is said in *Amos & Ferard on Fixtures*, (3d ed.) 63, has never been impugned in England, and it was cited with approval and commendation by Lord Chancellor Selborne, in *Wake v. Hall*, 7 Q. B. D. 295, 301. See also *Sunderland v. Newton*, 3 Sim. 450; *Jenkins v. Gething*, 2 Johns. & Hem. 520; *Ombony v. Jones*, 19 N. Y. 234; *Ford v. Cobb*, 20 N. Y. 344.

The result, in the opinion of a majority of the court, is, that according to the terms of the report there must be judgment for the plaintiff for one hundred dollars.

Judgment for the plaintiff.

II. BETWEEN LIFE TENANT AND REMAINDER-MAN.

LAWTON v. LAWTON.

BEFORE LORD HARDWICKE, C. 1743.

[Reported 3 Atk. 12.]

THE material question in the cause was, whether a fire-engine set up for the benefit of a colliery by a tenant for life, shall be considered as personal estate, and go to his executor, or fixed to the freehold, and go to a remainder-man.

There was evidence read for the plaintiff, a creditor of the tenant for life, to prove that the fire-engine was worth, to be sold, three hundred and fifty pounds; and that it is customary to remove them; and that in building of sheds for securing the engine, they leave holes for the ends

of timber, to make it more commodious for removal, and that they are very capable of being carried from one place to another.

That the testator, the counsel for the plaintiff said, was dead, greatly indebted, and it would be hard, when he has been laying out his creditors' money in erecting this engine, that they should not have the benefit of it, but that the strict rule of law should take place.

Mr. Wilbraham compared it to the case of a cider-mill which is let in very deep into the ground, and is certainly fixed to the freehold; and yet Lord Chief Baron Comyns, at the assizes at Worcester, upon an action of trover brought by the executor against the heir, was of opinion that it was personal estate, and directed the jury to find for the executor.

Evidence was produced on the part of the defendant, to show that the engine cannot be removed without tearing up the soil, and destroying the brick work.

Mr. Clark, of counsel for the defendant, cited Finch, fol. 135, under the head of Distress; and the case of *Wortley Montague v. Sir James Clavering*, about two years ago before Lord Hardwicke.

LORD CHANCELLOR. This is a demand by a creditor of Mr. Lawton, who set up the fire-engine, to have the fund for payment of debts extended as much as possible.

It is true the court cannot construe the fund for assets, further than the law allows, but they will do it to the utmost they can in favor of creditors.

This brings on the question of the fire-engine, whether it shall be considered as personal estate, and consequently applied to the increase of assets for payment of debts.

Now it does appear in evidence, that in its own nature it is a personal movable chattel, taken either in part, or in gross, before it is put up.

But then it has been insisted, that fixing it in order to make it work, is properly *an annexation* to the freehold.

To be sure, in the old cases, they go a great way upon *the annexation* to the freehold, and so long ago as Henry the Seventh's time, the courts of law construed even a copper and furnaces to be part of the freehold.

Since that time, the general ground the courts have gone upon of relaxing this strict construction of law is, that it is for the benefit of the public to encourage tenants for life, to do what is advantageous to the estate during their term.

What would have been held to be waste in Henry the Seventh's time, as removing wainscot fixed only by screws, and marble chimney-pieces, is now allowed to be done.

Coppers and all sorts of brewing vessels, cannot possibly be used without being as much fixed as fire-engines, and in brewhouses especially, pipes must be laid through the walls, and supported by walls; and yet, notwithstanding this, as they are laid for the convenience of trade, landlords will not be allowed to retain them.

This being the general rule, consider how the case stands as to the engine, which is now in question.

It is said, there are two maxims which are strong for the remainder-man: First, That you shall not destroy the principal thing, by taking away the accessory to it.

This is very true in general, but does not hold in the present case, for the walls are not the principal thing, as they are only sheds to prevent any injury that might otherwise happen to it.

Secondly, It has been said, that it must be deemed part of the estate, because it cannot subsist without it.

Now collieries formerly might be enjoyed before the invention of engines, and therefore this is only a question of *major* and *minus*, whether it is more or less convenient for the colliery.

There is no doubt but the case would be very clear as between landlord and tenant.

It is true, the old rules of law have indeed been relaxed chiefly between landlord and tenant, and not so frequently between an ancestor and heir at law, or tenant for life and remainder-man.

But even in these cases, it does admit the consideration of public conveniency for determining the question.

I think, even between ancestor and heir, it would be very hard that such things should go in every instance to the heir.

One reason that weighs with me is, its being a mixed case between enjoying the profits of the land, and carrying on a species of trade; and, considering it in this light, it comes very near the instances in brewhouses, &c. of furnaces and coppers.

The case too of a cider-mill, between the executor and the heir, mentioned by Mr. Wilbraham, is extremely strong; for though cider is part of the profits of the real estate, yet it was held by Lord Chief Baron Comyns, a very able common lawyer, that the cider-mill was personal estate notwithstanding, and that it should go to the executor.¹

It does not differ it in my opinion, whether a shed over such an engine be made of brick or wood, for it is only intended to cover it from the weather and other inconveniences.

This is not the case between an ancestor and an heir, but an *intermediate* case, as Lord Hobart calls it, between a tenant for life and remainder-man.

Which way does the reason of the thing weigh most, between a tenant for life and a remainder-man, and the personal representative of tenant for life, or between an ancestor and his heir, and the personal representative of the ancestor? Why, no doubt, in favor of the former, and comes near the case of a common tenant, where the good of the public is the material consideration, which determines the court to construe these things personal estate; and is like the case of emblements, which shall go to the executor, and not to the heir or remainder-man,

¹ *Holmes v. Tremper*, 20 Johns. 29, *acc.* But see *Wadleigh v. Janvrin*, 41 N. H. 503, 504.

it being for the benefit of the kingdom, which is interested in the produce of corn, and other grain, and will not suffer them to go to the heir.

It is very well known, that little profit can be made of coal-mines without this engine; and tenants for lives would be discouraged in erecting them, if they must go from their representatives to a remote remainder-man, when the tenant for life might possibly die the next day after the engine is set up.

These reasons of public benefit and convenience weigh greatly with me, and are a principal ingredient in my present opinion.

Upon the whole, I think this fire-engine ought to be considered as part of the personal estate of Mr. Lawton, and go to the executor for the increase of assets; and decreed accordingly.¹

¹ "In the case of *Lawton v. Lawton* it was determined it [an engine] should go to executors, partly on the reasons there mentioned, and partly on the authority of the case of a cider-mill, there cited to have been so adjudged by Lord C. B. Comyns; that of *Lawton v. Lawton*, was the case of creditors; but that makes no difference, because the question is, Whether part of the real or personal estate?" *Per* LORD HARDWICKE, C., in *Dudley v. Warde*, Amb. 113, 114. See *D'Eyncourt v. Gregory*, L. R. 8 Eq. 382; *Hill v. Bullock*, [1897] 2 Ch. 482; *Leigh v. Taylor*, [1902] A. C. 157; *Overman v. Sasser*, 107 N. C. 432.

"The claim of the executors of a tenant for life to remove trade fixtures stands, according to the decided cases, next after the claim of an ordinary tenant from year to year. All the cases that are authorities in favour of the right of a tenant from year to year to remove are not therefore necessarily decisions in favour of the executors of a tenant for life. All decisions that are adverse to the claim of the tenant from year to year are decisions adverse to the claim of the executors of the tenant for life. But I have not had my attention called to any authority, nor do I know that any authority exists, which shows what is the difference between the claim of the tenant for life and the claim of an ordinary tenant from year to year with respect to trade fixtures. I think it would be a curious way of laying down the rule of law merely to state that where you find that the tenant from year to year can remove, you have, as it were, to strike something off—something which I am not able to appreciate—from that claim when you are trying the case of the right or claim of the executors of a tenant for life to remove. In other words, I do not know what deduction I ought to make. It is said, however, that the case for removal is more favourable to the tenant from year to year than it is for the executors of a tenant for life: but to determine in what degree it is more favourable, so far as I know, there is no authority. But the claims to remove trade fixtures put forward by a tenant from year to year, and put forward on behalf of the executors of a tenant for life, stand at the bottom on the same principle, and that is in favour of trade. Now, there is one decision which is always quoted on questions where the executors of a tenant for life are claiming to remove, namely, *Lawton v. Lawton* (3 Atk. 13). Lord Hardwicke there stated the principle upon which he proceeded, and it is contended that the principle on which his decision turned was for the general public benefit, it being a convenience to allow tenants for life to remove trade fixtures. His lordship had to decide a case with reference to what is termed a fire-engine, and he held that the executors of the tenant for life were entitled to remove." CHITTY, J., in *Ward v. Countess of Dudley*, 57 L. T. (N. S.) 20, 22. And see *Mass. Pub. St. c. 126, § 10*.

"Tenants for life are usually widows as dowresses, or husbands as tenants by curtesy, or devisees under wills with remainder to children or other blood relations. The persons entitled in remainder, in such cases, are ordinarily those nearest in

III. BETWEEN VENDOR AND VENDEE.

DUSTIN v. CROSBY.

SUPREME JUDICIAL COURT OF MAINE. 1883.

[Reported 75 Me. 75.]

ON report.

Trover for the value of a building erected in the summer of 1876 on land of Benjamin F. Mills, by George W. Dearborn, who was in possession of the land under a verbal contract to purchase. Plaintiff claims as purchaser at an officer's sale as personal property on an execution rendered in a lien claim suit against Dearborn, in favor of a material man. Defendant claimed under a deed from Mills, which he procured as attorney for a Mr. Kendall, who furnished labor in erecting the building, and for whom he prosecuted a lien claim suit to final judgment and execution, and levied upon the building and lot as realty.

The writ was dated December 16, 1879, and the plea was the general issue.

By the terms of the report, if the action could be maintained, the case was to be sent back for an assessment of damages; otherwise, nonsuit to be entered.

Other material facts stated in the opinion.

Thomas H. B. Pierce, for the plaintiff.

J. Crosby, for the defendant.

PETERS, J. Section 27, c. 91, R. S., gives a lien for labor and materials furnished in the erection, alteration and repairing of houses and other buildings. It is a lien upon the realty if the debtor owns realty, and upon the building as personalty if the debtor owns the building only.

It appears that the debtor, under whom both parties claim in the present controversy, made a verbal purchase of a parcel of land, partly paid for it, took possession of it, erected a building upon it, and failed to pay for the labor and materials expended in erecting the building. One creditor attached the building as personal property, and another attached the building together with the lot of land as real estate, to establish their lien claims thereon. Much has been said in the case about the propriety of the different modes of attachment. We have no doubt that the ordinary rule governs. Real estate must be attached as real estate, and personalty as personalty. The distinction between the two modes of attachment is not to be disregarded by ties of affection and blood to the tenants of the life estate. It may well be presumed, as between such parties, that improvements put upon the property by the life tenant, are not designed for the temporary use of such tenants, but as permanent ameliorations." COOPER, C., in *Cannon v. Hare*, 1 Tenn. Ch. 22, 33.

a lien-creditor, any more than by other creditors. Both classes of creditors may have attachments upon the property at the same time. This construction, it is replied, will prevent a lien-creditor from attaching equitable interests in land. But it no more prevents lien-creditors than it does other creditors. Equitable interests that are not attachable by one class of creditors, are not attachable by any creditor. The legislature has merely given the lien-creditor a preference in the pursuit of remedies that are open to all creditors. Any different construction would lead inevitably to confusion.

The result of this view of the case, is, that neither of the attaching creditors got a valid attachment upon the building in controversy. The building became legally a part of the real estate of the party (Mr. Mills) who verbally contracted to sell the land. The debtor may have had some equitable right in the property, but not of a nature to be attached in a suit at law. Mere possession, without title, may be subject to execution. Possession is evidence of title. But where possession is held by means of some equitable title purely, it may be subject to an equitable, but not a legal, attachment. *Freem. Judg.* § 175; *Russell v. Lewis*, 2 Pick. 508. By force of the bargain between the parties the building became attached to and a part of the soil. It could neither be sold as the debtor's personal property, nor levied upon as his real estate. This is not the case of a building placed upon land by the permission of the owner of the land, with an understanding of the parties that the title to the structure is to remain in the builder. Of course, a person who verbally sells land to be built upon, may superadd such an agreement or permission to the verbal sale. But nothing of the kind appears here.

The doctrine applicable to the present case is that maintained in *Hemenway v. Cutler*, 51 Maine, 407, where it was decided, that erections made by one occupying land under a bond for a deed must be regarded as real estate, and cannot be removed by the occupant or be attached as his property. This rule must apply with as much force where the bargain of purchase is verbal instead of written. *Russell v. Richards*, 1 Fair. 429, is not an opposing authority. That case was decided upon the ground of estoppel, and even that case has been a good deal criticised by other courts. Certainly, its doctrine is not to be extended. See *Fifield v. Railroad*, 62 Maine, at p. 80. *Pullen v. Bell*, 40 Maine, 314, an opposing authority, was a briefly considered case and an erroneous decision. It was determined upon the authority of *Russell v. Richards*, *supra*, and wrongfully so, for the facts of the two cases are not alike. The case is undoubtedly overruled by later decisions. *Hinkley v. Black*, 70 Maine, 473; *Lapham v. Norton*, 71 Maine, 83. The doctrine of *Hemenway v. Cutler*, *supra*, is sustained by the Massachusetts court in quite a number of cases. *Poor v. Oakman*, 104 Mass. 309; *Westgate v. Wixon*, 128 Mass. 304, and cases cited. And such is the doctrine of the American and English cases generally.

But the counsel for the plaintiff ably argues the point presented upon his brief, that the facts bring this case within the operation of the principle established in the case of *Russell v. Richards*, cited *supra*. He contends that the cord of title which held the building to the soil, was severed, and that two separate ownerships were created, by the admissions and conduct of Mr. Mills, the owner of the soil. We think, however, that the most favorable view that can be taken of the facts will not sustain the position claimed by him. What did the owner do or say to prevent title accruing to himself, or to divest it from himself, up to the date of his deed to the defendant? It is not pretended that there was any original bargain that the builder should retain title to the structure to be erected. Nor is there any tangible evidence that can be construed into a complete disclaimer of ownership at any time. Mr. Mills himself states the matter as favorably for the plaintiff as any witness, and he denies, and his denial is not overcome by other evidence, that he ever renounced all claim to the building. He constantly asserted that he would not release the building until certain damages, fifty dollars or so, for an injury to the lot, should be paid to him. He at no time fully let go of a claim upon the whole estate, building included. The principle must be the same whether he retained the title to secure a few dollars or many dollars.

The effect of the owner's consenting, if he did, to furnishing the supplies and labor, as provided for in R. S., c. 91, § 28, and laws of 1876, c. 140, is not spoken of upon the briefs of counsel. But the result would be the same. If any estate would be bound by the consent of the owner, it would be, *prima facie*, such estate as the owner had. Here he had the whole.

*Plaintiff nonsuit.*¹

APPLETON, C. J., WALTON, DANFORTH, and VIRGIN, JJ., concurred.

SYMONDS, J., concurred in the result.

¹ "The principle upon which a tenant is permitted to remove from the land demised to him trade fixtures that he has placed thereon is that, as he has hired the land in order that he may occupy it for use, and has paid for such use and occupation, it is but equitable that he should be permitted to remove the structures that he may have placed thereon for the very purpose of enabling him to enjoy the use for which he hired the land. This principle, however, has no application to the occupancy of the land by a vendee who takes possession by virtue of the terms of an executory contract for its purchase. His entry is by reason of the estate in the land which he claims in himself and the improvements which he makes thereon are made in contemplation of his becoming the owner, and if permanently affixed to the land become a part of the realty as fully as if he were the absolute owner. They, therefore, belong to the vendor in case he subsequently declines to comply with his contract of purchase, and he has no right to remove them from the land." *HARRISON, J., in Pomeroy v. Bell*, 118 Cal. 635, 638. — ED.

See *Ogden v. Stock*, 34 Ill. 522; *Hinkley Iron Co. v. Black*, 70 Me. 473; *Kingsley v. McFarland*, 82 Me. 231; *McLaughlin v. Nash*, 14 Allen, 136; *McConnell v. Blood*, 123 Mass. 47; *Murdock v. Gifford*, 18 N. Y. 28; *Rogers v. Brokaw*, 25 N. J. Eq. 496.

Cf. Raymond v. White, 7 Cow. 319.

B. *Fixtures are not Chattels before Removal.*

MACKINTOSH v. TROTTER.

EXCHEQUER. 1838.

[Reported 3 M. & W. 184.]

TROVER for fixtures, furniture, &c. Plea, that the goods and chattels in the declaration mentioned were not, nor were any of them, the property of the plaintiff. At the trial before *Coltman, J.*, at the last Liverpool Assizes, it appeared that the action was brought by the plaintiff, an innkeeper at Liverpool, to recover from the defendants, his assignees under a fiat in bankruptcy, which he alleged to be void, the value of certain tenant's fixtures and household furniture, which they, as his assignees, had put up to sale by auction, together with the lease of his house and the goodwill of his business. The fixtures and furniture were sold in one lot, for £79 8s. 8d., and it was proved that the former still remained affixed to the freehold, not having been removed by the purchaser. It was contended, for the defendants, that the fixtures were not recoverable in trover. The learned judge was disposed to think that the defendants, by selling them, had, as between themselves and the plaintiffs, treated them as goods and chattels: he however desired the jury to assess the value of the fixtures separately; and they, having stated their value at £55, a verdict passed for the plaintiff for £79 8s. 8d., leave being reserved to the defendants to move to reduce the damages by the sum of £55. *Cowling* obtained a rule accordingly.

Cresswell, Wightman, and Addison, now showed cause.

Alexander and Cowling, in support of the rule.

PARKE, B. *Minshall v. Lloyd* [2 M. & W. 450] is a direct authority on this point. I gave my opinion in that case, not on my mere impression at the time, but after much consideration of this point, — that the principle of law is, that, whatsoever is planted in the soil belongs to the soil: *quicquid plantatur solo, solo cedit*; that the tenant has the right to remove fixtures of this nature during his term, or during what may, for this purpose, be considered as an *excrescence* on the term; but that they are not goods and chattels at all, but parcel of the freehold, and as such not recoverable in trover. That case is a direct authority, so far as my opinion and that of my Brother Alderson go; and I think it was a correct decision.

BOLLAND and GURNEY, Barons, concurred.

*Rule absolute.*¹

¹ "When an exception to the general law of fixtures was introduced in favor of trade fixtures, was the principle of that exception this, that they were never affixed to the freehold at all, or was it that, although affixed to the freehold, there was an exception to the right of removal? Was this exception with respect to trade fixtures an exception to the general rule, that they are affixed to the freehold which depends on

the nature of the annexation; or was it an exception to the rule that they were incapable of removal during the term? If they were affixed to the freehold substantially, it was not an exception to that portion of the rule, but an exception in favor of trade fixtures to the rule that the tenant could not remove them, and they still remained affixed to the freehold; they were still fixtures affixed to the freehold, and, unless removed, would go to the landlord. Now, if the exception was an exception to the affixing to the freehold, to their becoming part of the freehold, one is utterly at a loss to comprehend, if they are trade fixtures, why, if they are not removed during the term, they go to the landlord. Why should they go to the landlord, except because they are annexed to his freehold, and have not been removed? Why should they? I confess I am utterly at a loss to know, except that a suggestion has been made — I do not mean for the first time — but a suggestion has been made that after the term it would be a trespass to go on the premises to remove the fixtures belonging to the tenant; the tenant has no longer a right to go on the premises. It would be a trespass on his part to go and get his fixtures; and therefore we consider — for this is the suggestion — that inasmuch as though he had the right to remove them, he has not removed them: he meant to abandon them, and make them a present to the landlord. I must say, anything more unsatisfactory to my mind than that I can hardly imagine. Clearly, to my mind, the exception was not an exception to the annexation to the freehold to their being fixed to the freehold; but the exception in favor of trade was, that they are capable of being removed by the tenant within the term. It appears to me that that is the principle of the exception. Some cases have been referred to with reference to the language of the judges; and, no doubt, it may, upon a somewhat hypercritical examination, be considered as rather tending to be an exception as to fixtures affixed to the freehold; but I have examined the language of all the cases, and it appears to me that it would be unreasonable and unfair to those very judges to say that that was in their mind. The question was not in their minds at the moment whether the exception was an exception in favor of trade fixtures so as to make them not affixed to the freehold, or an exception as to the right of removal. The question in their minds was, are these fixtures affixed, and, if affixed, are they trade fixtures; and if they are trade fixtures, are they not capable of being removed during the term? . . . Now I made the observation that I was at a loss to understand upon what sensible principle, if a tenant does not move his trade fixtures within the term, they go to the landlord. It has been suggested, as I have already observed, that the tenant must be supposed to have meant to make the landlord a present of them. As I have said, that is not satisfactory to my mind. I think they go to the landlord for this reason, because they are affixed to the freehold, and are not removed within the term; otherwise, supposing that besides the fixtures there was a vast number of utensils not affixed to the freehold at all, — the utensils of a brewery, for example; I cannot enumerate the various articles that would be used in one species of manufactory or another, but, of course, in every manufactory, besides the fixed machinery, there must be a vast quantity of loose machinery, mere chattels, never fixed to the freehold, and of course not forming part of the freehold. Supposing that the tenant should have omitted, through inadvertence or accident, at the expiration of the term to remove all those loose fixtures, do those go to the landlord? and why not? Why should not the same observation be made on his not removing them during the term? It must be assumed that he meant to make the landlord a present of them. Then the house, utensils and articles remain the property of the tenant: and why do not the others remain his property? Why does not the same principle apply to these? It appears to me that, as to one, it consists of chattels which are not affixed to the freehold, and with regard to the other they cease to be chattels as long as they remain affixed to the freehold, and they become part of the freehold; and the only exception is, not to their being affixed to the freehold, or to others being part of that freehold, but as to the right of removal which in favor of trade is given to the tenant." *Per* KINDERSLEY, V. C., in *Gibson v. Hammersmith R. Co.*, 32 L. J. (N. S.) Ch. 337. See *Guthrie v. Jones*, 108 Mass. 191; *Brown v. Wallis*, 115 Mass. 156.

*C. Loss of Right to Remove.*THRESHER *v.* EAST LONDON WATER WORKS COMPANY.

KING'S BENCH. 1824.

[*Reported 2 B. & C. 608.*]

COVENANT on a lease. Breach, non-repair of premises. Plea, performance of the covenant. The cause was tried at the sittings at Guildhall after Trinity term, 1823, when a verdict was found for the plaintiff, damages £500, subject to the opinion of the court upon a case, stating in substance as follows. The lease upon which the action was brought, was a lease by indenture made by the plaintiff's ancestor to the defendants in the year 1791, reciting a former lease between the parties under whom the plaintiff and defendant claimed, made in the year 1756 for thirty-nine years; and which would not expire until 1795, and was in force at the time of making the lease in question. An under-lease of part of the premises was granted in 1783, by the lessees in the lease of 1756, to one Joseph Matthews for thirty-one years, and which, consequently, would not expire until 1814, several years after the expiration of the lease of 1756. The underlease of 1783 was granted in consideration of a former underlease, which had become vested in Joseph Matthews, and there was a covenant to repair, and to leave at the end of the term the premises so repaired, together with all such erections and buildings as then were or should be at any time thereafter built or set up in, upon, or about the same, or any part thereof. In 1780, Matthews erected a lime-kiln on the premises, at the expense of £160, and T. Ayres and Joseph Watford, the assignees of the term granted to Matthews, erected a similar lime-kiln on the premises in 1790. It also appeared by the underlease of 1783, that a warehouse and stable were then standing on the premises thereby demised. Both these lime-kilns were therefore existing in 1791, when the lease in question was granted. The lime-kilns were built of brick and mortar, and the foundations let into the ground. They were erected for the purpose of carrying on the trade of a lime-burner. The chalk and coals used in the business were brought up the river Thames, and the lime sold on the premises to customers. By the lease of 1791, the demise was of a piece of ground formerly called the Osier Hope, and the wharves and buildings erected and built thereon, situate, &c., and abutting, &c., as the same were demised by the lease of 1756; and the premises were said to be in the occupation of the several persons therein named, and among others, of James Ayres, lime-burner, *habendum* the said piece of ground, wharves, and buildings thereon erected and built. The lessees covenanted to repair, uphold, and maintain this piece of ground, erections, and buildings, wharves, cranes, and ponds, and the hedges,

ditches, pales, and fences, belonging to the premises, and the said premises so repaired, upheld, and maintained, to leave and yield up at the end of the term. The action was brought for the removal of these lime-kilns. The lease of 1783 afterwards became vested in one Meeson, who, after the expiration of the term thereby granted, held the premises thereby demised for some time, as tenant from year to year, to the defendants, and pulled down the lime-kilns four years ago. The question in the cause was, whether the removal of those lime-kilns was a breach of the covenant to repair contained in the lease of 1791?

Amos, for the plaintiff.

Campbell, for the defendant.

ABBOTT, C. J., delivered the judgment of the court; and, after stating the facts of the case, proceeded as follows:—

The question in the cause is, whether the removal of the lime-kilns be a breach of the covenant to repair, contained in the lease of 1791.

On the behalf of the defendants three grounds of objection were taken:

First, that lime-kilns are not buildings within the meaning of a covenant to repair buildings; but this is answered by the case, in which it is found that they were erected with brick and mortar, and their foundations let into the ground.

Secondly, that, being erected for the purpose of trade, they were removable generally.

Thirdly, that, upon the true construction of the several leases set forth in the case, they were removable, or rather that they were not to be considered as having been demised by the lease of 1791.

By this lease of 1791 the demise is of a piece of ground formerly called the Osier Hope, and the wharves and buildings erected and built thereon, situate, &c., and abutting, &c., as the same were demised by the lease of 1756, and the premises are said to be in the several occupations of persons therein named, and among others of James Ayres, lime-burner, *habendum* the said piece of ground, wharves, and buildings thereon erected and built. The lessees covenant to repair, uphold, and maintain the said piece of ground, erections and buildings, wharves, cranes, and ponds, and the hedges, ditches, pales, and fences belonging to the premises; and the said premises so repaired, upheld, and maintained, to leave and yield up at the end of the term.

Now it is settled, by the case of *Naylor v. Collinge*, 1 Taunt. 19, that buildings erected for the purpose of trade, under a lease containing such a covenant, cannot be removed by the lessee, the terms of the covenant being general, and containing no exception. And this is highly reasonable, because the expectation of buildings to be erected during a term, and left at its expiration, is often one of the inducements to the granting of a lease, and forms a considerable ingredient in the estimate of the rent to be reserved. And if buildings for trade erected during a lease cannot be removed without the breach of such a covenant, neither can buildings erected before, and existing at the date of a lease, be removed without a breach of the covenant, unless there

shall be some very special matter to take them out of the operation of the covenant. Whether any matter capable of having such an effect can exist *dehors* the deed may be questionable; but it is enough for the purpose of the present cause to say, that no such matter exists in this case.

Such matter was supposed to be derivable from the former lease of 1756, and the under-lease of 1783.

In the lease of 1756 the premises are described as all that piece of ground called the Osier Hope, with the use of a crane, then standing on part of it, and part of which had been made into a wharf, for the landing, storing, and keeping goods, wherein are two docks, and the wharf is fenced off by pales, and part of which was formerly an osier ground, but then converted into three ponds or reservoirs. It does not appear by the case whether any covenant to repair was contained in this lease, and the instrument is probably lost, and its contents known only by the recital of it in the lease of 1791, in which it further appears, that the lessees had applied for a further term of thirty-one years, which is granted at a considerable increase of rent. There is, therefore, nothing in this lease of 1756 that can restrain or qualify the covenant to repair in the lease of 1791; and it has not been shown by what reason or rule of law the lessees of 1791, having accepted a lease (by indenture) of ground and buildings thereon, could be allowed to say that the ground only, and not the buildings thereon, should be deemed to pass by that lease. It would be very difficult to maintain such a proposition, by the circumstance of the buildings having been erected by their under-lessee during the continuance of the first lease, even if such under-lessee, as between him and his own immediate lessor, had a right to remove the buildings; for the original lessor might very reasonably say, that he had nothing to do with any contract between other parties. But, upon adverting to the under-lease of 1783, the foundation of such an argument is wholly removed, because, by the terms of that under-lease, the under-lessee, Matthews, has covenanted, not only to repair and uphold the premises demised to him, but also to leave, at the end of the term, those premises so repaired and upheld, together with all such erections and buildings as then were or should be at any time thereafter built or set up, in, upon, or about the same, or any part thereof. So that, according to the case of *Naylor v. Collinge*, the under-lessee himself could not have removed those lime-kilns without a breach of his covenant made with his own lessors.

For these reasons our judgment is in favor of the plaintiff; and the *postea* is to be delivered to her. *Judgment for the plaintiff.*

WEETON v. WOODCOCK.

EXCHEQUER. 1840.

[Reported 7 M. & W. 14.]

TROVER for a steam-engine boiler. Pleas, 1st, not guilty; 2dly, that the plaintiffs were not possessed as of their own property: on which issues were joined. At the trial before *Erskine*, J., at the last Liverpool Assizes, it appeared that the defendants were the assignees of one J. F. Taylor, a bankrupt. The plaintiffs, together with one Philip Newton (since deceased), had demised to Taylor, by indenture, a cotton factory, with the warehouse, counting-house, engine, and engine-house, &c., &c., implements, tackle, furniture, and machinery, the property of the plaintiffs and Newton, to the said factory and steam-engine belonging, and therewith used and enjoyed, &c., &c., for a term of seven years from the 12th of May, 1836. The lease contained covenants by Taylor to keep the premises in repair, to keep up a good steam-engine, with a boiler of beaten iron of certain dimensions, and at the end or sooner determination of the term, to leave and deliver up possession of the premises, and all the things therein, in good repair, or to pay the lessors the value of such as were not so left; with a proviso for re-entry in case of the bankruptcy of Taylor, and a fiat issuing thereon, or upon non-performance of any of the covenants. The steam-engine boiler in question was set up by Taylor during his tenancy, and annexed to the engine. It was built round with brick, and firmly fixed to the floor and walls of the engine-house; being, according to the statement of the witnesses, more firmly annexed than it was usual at a subsequent period to annex such boilers. In April, 1838, Taylor committed an act of bankruptcy, and on the 16th of that month a fiat in bankruptcy issued against him, under which the defendants were appointed assignees, and took possession of the bankrupt's property. A breach of the covenant to repair had been committed previously to the issuing of the fiat; and on the 30th of May, 1838, the plaintiffs made an entry on the premises, in order to enforce the forfeiture. The assignees, however, retained possession, and about the 20th of June following sold the boiler, and it was subsequently removed from the premises. It was contended for the plaintiffs, first, that they were entitled to recover under the covenant, to keep up the engine and boiler, and to leave them on the premises at the determination of the term; and further, that independently of the language of this particular covenant, they were entitled to the boiler as being a fixture, and not having been removed during the term. The learned judge left it to the jury to say whether the boiler was a fixture; and if so, whether it had been disannexed within a reasonable time after the entry of the plaintiffs. The jury found it to be a fixture, and that it had not been

disannexed within such reasonable time; and a verdict was entered for the plaintiffs for £87, leave being reserved to the defendants to enter a nonsuit, if the court should be of opinion that the plaintiffs were not entitled under the covenant, and that the defendants, as assignees of the lessee, had a right to remove the boiler so long as they remained in possession.

In Michaelmas Term, *Wightman* obtained a rule accordingly; against which, in Easter Term,

Cowling (*Cresswell* with him), showed cause.

Wightman and *Crompton*, contra.

ALDERSON, B. In this case we took time to consider whether the assignees of the bankrupt had, under the circumstances, proved the right of removing the tenant's boiler, which was a fixture. It appeared that the landlord had made, on the 30th of May, 1838, an entry to avoid the lease after a forfeiture committed, and that subsequently to that entry, though not (as the jury have expressly found) within a reasonable time after it, the assignees, still continuing in possession, removed and sold the boiler in question. The point is, whether they had the right so to do.

The rule to be collected from the several cases decided on this subject seems to be this, that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him, as he holds the premises under a right still to consider himself as tenant. That was the rule on which this court acted in *Minshall v. Lloyd*, 2 M. & W. 460, in which Mr. Baron Parke, in giving his judgment, puts it on the ground that there was "no doubt that in that case the steam-engines were left affixed to the freehold after the expiration of the term, and after the plaintiffs had any right to consider themselves tenants." In the present case, also, this boiler was removed after the entry for a forfeiture, and at a time after the assignees had ceased to have any right to consider themselves as tenants. And further, even if they had the right, in a case where the entry determining the tenancy is the act of a third person, to consider themselves entitled to a reasonable time for removing the fixture, the jury have found that they did not avail themselves of that privilege. The rule, therefore, for a nonsuit must be discharged.

*Rule discharged.*¹

¹ See *Deeble v. M'Mullen*, 8 Ir. C. L. 355; *Brown v. Reno El. Lt. & P. Co.*, 55 Fed. R. 229, 236.

LONDON LOAN AND DISCOUNT COMPANY v. DRAKE.

COMMON PLEAS. 1859.

[Reported 6 C. B. (N. S.) 798.]

THE first count of the declaration was trover for goods; the second was for wrongfully depriving the plaintiffs of the use and possession of divers goods and fixtures of the plaintiffs in and affixed and fastened to a certain dwelling-house and premises in St. Mary Axe; and the third was for seizing and taking certain goods and fixtures of the plaintiffs in and affixed and fastened to the said house and premises in the said second count mentioned.

The defendant pleaded not guilty, and a traverse that the several goods and fixtures in the several counts mentioned were the goods and fixtures of the plaintiffs. Issue thereon.

The cause was tried before *Crowder, J.*, at the sittings in London after last Trinity Term, when the following facts appeared in evidence: One Robinson, who was tenant of the premises in question (an eating-house in St. Mary Axe) under a lease, of which seven years were unexpired, on the 4th of September, 1857, borrowed a sum of money of the plaintiffs, giving them by way of collateral security a bill of sale upon all his furniture and effects upon the premises, including certain tenant's fixtures. The bill of sale contained an absolute assignment of all the goods and effects therein comprised, subject to a proviso making the same void if Robinson should repay the money borrowed by certain instalments; and also an agreement, that, in case default should be made in payment of the money, or if, amongst other things, the said goods and effects should be distrained for rent, it should be lawful for the plaintiffs to enter into and upon the premises, or wherever else the said goods and effects should be, and to receive and take into their possession and thenceforth to hold to the same, &c. Default having been made by Robinson, the plaintiffs, by one Priest, on the 30th of March, 1858, entered upon the premises for the purpose of making a seizure, but found that the landlord had already distrained for arrears of rent, and that his broker was in possession. Priest, however, claiming the fixtures, left a man also in possession; but the fixtures were not severed.

On the 8th of March, 1858, Robinson had given his landlord an authority to distrain the fixtures; and on the 5th of April he made a formal surrender of the term to him. A fresh lease was afterwards granted by the landlord to Drake, — the tenant's fixtures which had formerly belonged to Robinson still remaining upon the premises unsevered from the freehold. The plaintiffs made a formal demand of the fixtures upon the defendant, who declined to give them up, saying that he had purchased them from Robinson.

Upon these facts being proved, the learned judge directed a verdict to be entered for the defendant, reserving leave to the plaintiffs to move to enter a verdict for them for £23 2s., if the court should be of opinion that they were under the circumstances entitled to recover in respect of the fixtures.

Atherton, Q. C., obtained a rule *nisi*.

Day showed cause.

J. Brown (with whom was *Lush*, Q. C.), in support of the rule.

WILLIAMS, J. The question in this case is, whether, if a lessee mortgages tenants' fixtures, and afterwards surrenders his lease, the mortgagee has a right to enter and sever them.

The principles of law applicable to this point are well settled; the difficulty lies in the application of them. It is fully established that the right of the lessee to remove fixtures continues only during the term, and during such further period of possession by him as he holds under a right still to consider himself as tenant; and it is plain that the right of his assignee can extend no further. On the other hand, it is laid down, as to a surrender, in *Co. Lit.* 338 b, that, "having regard to strangers who were not parties or privies thereto (lest by a voluntary surrender they may receive prejudice touching *any right or interest* they had before the surrender) the estate surrendered hath in consideration of law a continuance." This doctrine has been fully adopted and acted on in modern cases, — as, in *Pleasant v. Benson*, 14 East, 234; *Doe d. Beadon v. Pyke*, 5 M. & Selw. 146; *Pike v. Eyre*, 9 B. & C. 909, 4 M. & R. 661. And see *Ex parte Bentley*, 2 M. D. & De Gex, 591.

The question is thus reduced to the inquiry whether the mortgagee's right to sever the fixtures from the freehold is a "right or interest" within the meaning of this rule of law. And we are of opinion that it is. Certainly it is an interest of a peculiar nature, in many respects rather partaking of the character of a chattel than of an interest in real estate. But we think that it is so far connected with the land that it may be considered a right or interest in it, which if the tenant grants away, he shall not be allowed to defeat his grant by a subsequent voluntary act of surrender.

We are, therefore, of opinion that the plaintiffs may maintain an action against the defendant for preventing them from exercising their right to sever, and may in such action recover the value of the fixtures as severed.

*Rule absolute.*¹

¹ See *Saint v. Pilley*, L. R. 10 Ex. 127; *Moss v. James*, 37 L. T. (N. S.) 715; 38 *ib.* 595. But see *Talbot v. Whipple*, 14 Allen, 177; *Free v. Stuart*, 39 Neb. 220.

PUGH v. ARTON.

CHANCERY. BEFORE MALINS, V. C. 1869.

[Reported L. R. 8 Eq. 626.]

ON the 17th of February, 1865, the plaintiff, Edmund Lechmere Pugh, a solicitor, demised to John Vaughan a dwelling-house, shop, and other premises in the city of Worcester, from the 25th of March then next, for the term of seven years, at the yearly rent of £150, payable quarterly, subject to a proviso that in case J. Vaughan should become bankrupt, or assign his estate or effects, or enter into any composition for the payment of his debts, or if any execution should be levied on his goods or chattels, or if he should not from time to time fulfil all the covenants and agreements therein contained which on his part were to be performed, then, and in any of the said cases, it should be lawful for the plaintiff, his heirs or assigns, immediately, or at any time thereafter, to enter into and upon the said hereditaments thereby demised, and the same to repossess and enjoy as if the lease had never been made.

At the date of the lease there were upon the demised premises divers tenant's fixtures, and the greater part thereof still remained on the premises, but some had been removed, and others, of a like nature, substituted in their stead, and such fixtures still remained on the premises, and John Vaughan had affixed to the freehold of the premises certain other fixtures which were removable by the tenant.

On the 10th of May, 1867, John Vaughan executed a deed of arrangement with his creditors, in consequence of which the plaintiff was entitled to determine the tenancy, and to re-enter upon the premises, but, at the earnest entreaty of John Vaughan, the plaintiff consented to allow him to continue to occupy such premises as a yearly tenant, but upon all the terms and conditions of the lease, and he had accordingly continued in the occupation of the premises, and had paid the rent up to the 25th of December, 1868.

On the 11th of March, 1869, the plaintiff discovered that J. Vaughan had, on the 2d of the said month, executed a deed conveying all his estate and effects to the defendant George Arton absolutely, to be applied and administered for the benefit of his creditors, as if he had been duly adjudicated a bankrupt, and the said deed was registered on the said 11th of March. The defendant, in exercise of the powers given him by the said deed, had advertised for sale, by auction, all the stock-in-trade of John Vaughan, and his shop fixtures, and all other fixtures which were on the premises previous to the 11th of March; and the plaintiff served a notice upon the defendant, on the 12th of March, 1869, stating that such fixtures belonged to him, and that, as the term and interest of John Vaughan in the premises had been forfeited by breach of the conditions of his lease, the plaintiff claimed the possession of the premises, and all the fixtures.

On the 14th of March the plaintiff put a man into possession of the demised premises, where the fixtures still remained, whom the defendant afterwards forcibly ejected. The plaintiff thereupon filed his bill praying for an injunction to restrain the sale or removal from the demised premises of any of the shop fixtures, gas fittings, or other fixtures which were in, upon, or affixed to the messuage and premises at the time when J. Vaughan entered upon and became tenant thereof, or all or any of such fixtures attached to the freehold of the premises since J. Vaughan became the lessee or tenant thereof.

Mr. *Glasse*, Q. C., and Mr. *Elderton*, for the plaintiff.

Mr. *Pearson*, Q. C., and Mr. *Hadley*, for the defendant.

SIR R. MALINS, V. C. The question in this case arises between landlord and tenant. Under the lease of February, 1865, a house was demised by the plaintiff to John Vaughan for a term of years which, according to its duration, has not yet expired; but that lease contained a covenant or proviso that if the tenant did certain acts, amongst which was making an assignment for the benefit of his creditors, the landlord should have a right to re-enter; that is, in fact, the same thing as a forfeiture at the option of the landlord, not of course absolute, but at the landlord's option, so that the lease was in that way voidable, not void, on the happening of any of the specified events. On the 2d of March, 1869, Vaughan made an assignment for the benefit of his creditors, which, without doubt, amounted to an act of bankruptcy, and was a forfeiture of the lease upon the re-entry of the landlord. The fact did not become known to the plaintiff until the 11th of March, and on the 12th, the deed having been registered under the Act of Parliament, he gave notice to Vaughan that he intended to treat the lease as forfeited, but he did not enter until the 14th, and on that day, having a right to determine the lease, he did so by entering and re-vesting the estate in himself. Vaughan carried on the business of a bookseller, and there were certain fixtures in the house admitted on both sides to be tenant's fixtures, that is, things which, although fastened to the freehold in a certain sense, the tenant had still a right to remove during the continuance of the tenancy or lease. If, therefore, the lease was not forfeited, the tenant would still have that right, because the law is clear that where fixtures are put in by the tenant he has a right at any time during the continuance of the lease to remove them; but it is equally clear that if he omits during the lease to do so, after its expiration it is too late for him to remove the fixtures without the consent of the landlord. I was surprised to hear it argued that there were any doubts on this point, after *Lyde v. Russell*, 1 B. & Ad. 394, decided by the Court of Queen's Bench. That was a case of bells, which were affixed to the freehold, but which the tenant had an unquestionable right to remove during the tenancy, and the plaintiff having fixed them in his house allowed his tenancy to expire, and the landlord afterwards severed them from the house. The tenant then brought an act of trover for them, and the question

was, whether he was entitled to recover them, and Lord Tenterden and the Court there held that the property in the fixtures, which would have been in the tenant during the term, was vested in the landlord after its determination, and the plaintiff failed in the action. A great many cases have been cited, most of which are collected in Woodfall's *Landlord and Tenant*, p. 535, where it is laid down that when a lease expires by lapse or forfeiture by the act of the tenant (the right being the same in either case), if the tenant does not remove the fixtures during the continuance of the lease, or during the period whilst he remains in lawful possession, it is too late for him to do so after the landlord has entered for forfeiture. On the other side two cases were relied upon, *Stansfeld v. Mayor of Portsmouth*, 4 C. B. (N. S.) 120, and *Sumner v. Bromilow*, 34 L. J. (Q. B.) 130, both of which proceed upon the footing of there being a covenant that certain things should remain and certain things be removed. If those cases had been applicable to the present, I should have held, in accordance with them, that the tenant must have a reasonable time after the expiration by forfeiture or otherwise of the lease; but all that they decide is, that where there is an express contract that the tenant shall have a right to remove fixtures, that does not mean that the moment the term ends or is forfeited he loses his right, but that he must have a reasonable time after the lease determines. Those cases, therefore, do not vary the old law on the important principle involved in this case, nor do I think that it has been varied. Although I was told that the rule had been greatly relaxed, I do not find it so, but only that where there is an express contract between the parties the Court will put a reasonable construction upon it, and allow a tenant a reasonable time; in the absence of such contract there is no such right. I intend to act, therefore, on the law as I find it, and as I think it is, namely, that unless the tenant protects himself by a contract giving him a right to take away the fixtures after the expiration of the term, either by lapse of time or his own act, he cannot do so. There is one case where there was a contract, and the landlord determined the lease at will; there, of course, it would have been monstrous to give him the right to the fixtures, and the lessee was held entitled after that determination of the lease. In this case I think the plaintiff is entitled to those fixtures which come under the description of tenant's fixtures not removed during the continuance of the lease, there being no special contract. At the same time I think this suit a most unconscionable and ungracious one, and I shall not give the plaintiff any costs, although, as a general rule, the costs follow the result. It appears that money was expended in putting up these trade fixtures, and as a professional man the plaintiff ought not to have instituted this suit.¹

¹ See *Ex parte Stephens*, 7 Ch. D. 127; *Ex parte Brook*, 10 Ch. D. 100; *Morey v. Hoyt*, 62 Conn. 542.

"The ground upon which a tenant's right to remove his fixtures has been limited during the continuance of his term, rests upon the doctrine that if he neglected

SANDERS v. DAVIS.

QUEEN'S BENCH DIVISION. 1885.

[Reported 15 Q. B. D. 218]

SPECIAL case, from which the following facts appeared:—

By an indenture of mortgage dated the 1st of May, 1878, made between Henry Bennett of the one part, and the defendant of the other part, a messuage therein described was granted and released by the said Henry Bennett to the defendant, to secure repayment of 500*l.* with interest at 5 per cent per annum.

The premises were then occupied by one Snuth, as tenant, who carried on therein the trade of a grocer, and had placed on the ground floor the ordinary fixtures used by grocers. In September, 1881, Snuth determined his tenancy and removed his fixtures.

In September, 1881, Henry Bennett, the mortgagor, died, and the equity of redemption passed by his will, and ultimately by sales and various mesne assignments became vested in six different persons as tenants in common. These tenants in common had entered into no covenant to pay the mortgage debt of 500*l.*

In March, 1883, James Hunt became yearly tenant of the premises to the six tenants in common, and, on entering into possession, placed in the shop certain counters, shelves, partitions of wood and glass, gas pipes and burners, bells, and window blinds for the purpose of carrying on the trade of a draper and haberdasher.

In June, 1883, James Hunt bought an undivided sixth part or share of the premises from one of the tenants in common, and the undivided sixth part or share was conveyed to Hunt, subject as to the entirety to the mortgage for 500*l.*, but he entered into no covenant for payment off of the mortgage debt.

In August, 1883, Hunt mortgaged in fee the undivided sixth part of the equity of redemption, together with the fixtures then in and upon the premises, to the plaintiff.

The defendant never recognized or adopted the tenancy of Hunt, and in July, 1884, under the power of sale contained in his mortgage deed, he sold and conveyed the premises to a purchaser together with the trade fixtures placed in the shop by Hunt in March, 1883.

It was admitted that the fixtures as between all parties should be to avail himself of his right within this period, the law presumed that he voluntarily relinquished his claim in favor of the landlord. This presumption cannot arise where the term being uncertain in its continuance, may be terminated suddenly and without previous notice. To apply it to a party in possession under a license revocable at pleasure, would be manifestly unjust and without reason. It would be allowing a party, without any fault of his own, or any opportunity of removal, to be deprived of his property at the mere will and caprice of another." BRENT, J., in *Northern Central Ry. Co. v. Canton Co.*, 30 Md. 347, 355.

taken at 100L.; that they were trade fixtures; that they could be moved without injury to the fee; that the plaintiff demanded them from the defendant before the sale and before Hunt gave up possession of the premises, and that the sale of the fee and the fixtures only realized enough to satisfy the mortgage to the defendant.

The question for the opinion of the Court was whether the plaintiff was entitled under the circumstances to recover the value of the fixtures.

Thorne, for the plaintiff.

T. J. Bullen, for the defendant.

POLLOCK, B. I have no doubt the plaintiff is entitled to judgment. Between the mortgagor and mortgagee no doubt, unless there is some express reservation, all that is on the land fixed to the freehold, passes under a mortgage of the freehold to the mortgagee. That was the only point decided in *Meux v. Jacobs*, Law Rep. 7 H. L. 481. The question of the right of a tenant was not raised. Then there are the cases of *Ex parte Cotton*, 2 M. D. & De G. 725, and *Cullwick v. Swindell*, Law Rep. 3 Eq. 249, in which the parties on the one side were partners. It was argued that a person who carries on business with another on premises which have been mortgaged by the latter, ought to be entitled to the trade fixtures. The answer to this contention was that it is not possible in law to say that the fixtures belong to one partner more than to the other, and consequently they belong as much to the partner who is mortgagor as to the one who is a stranger to the mortgage. It is clear, then, that as they are the property of the mortgagor, they pass under the mortgage. The present case is quite different, and does not depend merely on the position and relation of the parties, but on the character of the things. In *Lawton v. Salmon*, in note to *Fitzherbert v. Shaw*, 1 H. Bl. 258, Lord Mansfield said, "All the old cases, some of which agree in the Year Books and Brooke's Abridgment, agree, that whatever is connected with the freehold, as wainscot, furnaces, pictures fixed to the wainscot, even though put up by the tenant, belong to the heir. But there has been a relaxation of the strict rule in that species of cases, for the benefit of trade, between landlord and tenant, that many things may now be taken away which could not be formerly, such as erections for carrying on any trade, marble chimney pieces, and the like, when put up by the tenant." The case we have to consider is one in which the goods are not strictly speaking the property of a tenant, but belong to some one who has come in under an agreement of tenancy with the mortgagor of the premises, and not under any agreement with the mortgagee. Hunt, when he entered on the premises, believed he was entitled to consider himself the tenant, and, in my opinion, whatever he brought on as trade fixtures comes within the spirit of the rule laid down by Lord Mansfield, and adopted in many other cases. I think, therefore, that Hunt would have been entitled to remove these fixtures and that consequently the plaintiff is entitled to judgment.

MANISTY, J. I am of the same opinion. When the mortgage was executed in May, 1878, the premises were in the occupation of a tenant, and at the expiration of his tenancy he had a right to remove, and did remove, his trade fixtures. The mortgagee after this allowed the mortgagor to remain in possession and deal with the property. Now if the defendant had taken possession and let to Hunt, and Hunt had brought trade fixtures on to the premises, he would have been entitled to remove them when his tenancy terminated. I cannot see why a mortgagee should be in a better position in this respect when he permits the mortgagor to deal with the property and let in a tenant. I think he must be taken to have known of the letting to Hunt, and to have acquiesced in it, and consequently he would not have been able to prevent Hunt from removing the fixtures. There must, therefore, be judgment for the plaintiff.

*Judgment for the plaintiff.*¹

WHITE v. ARNDT.

SUPREME COURT OF PENNSYLVANIA. 1836.

[*Reported 1 Whart. 91.*]

WRIT of error to the Court of Common Pleas of Northampton county, to remove the record of an action in which Abraham Arndt was plaintiff, and William White, defendant.

The material facts appeared to be as follows: Jacob Arndt devised to his wife for the term of her life, a brick store, a stone house, and two lots of ground, in the borough of Easton, with remainder in fee to Abraham Arndt, the plaintiff. The widow afterwards married William A. Lloyd, who, with his wife, demised the premises to William White, for the term of three years, from the 1st day of July, 1829, at the rent of 300 dollars per annum. Mrs. Lloyd, the tenant for life, died about the 25th December, 1829. White, the defendant, continued to occupy the premises, and paid rent quarterly, to the plaintiff, until the 1st of April, 1832. The premises were sold by the plaintiff at public sale, on the 23d of February, 1832.

The present action was originally instituted before a justice of the peace, to recover the sum of seventy-five dollars, being one quarter's rent of the premises due on the 1st of April, 1832. After hearing, the justice rendered judgment for the full amount of the plaintiff's demand. The defendant having appealed to the Court of Common Pleas, the defendant declared in *assumpsit*; and issue having been joined on the plea

¹ *Merchants' Nat. Bank v. Stanton*, 55 Minn. 211; *Pioneer Savgs. Co. v. Fuller*, 57 Minn. 60; *Paine v. McDowell*, 71 Vt. 28; *Belvin v. Raleigh Paper Co.*, 123 N. C. 138, acc. But see *Watkins v. Land Security Co.*, W. N. (1885) 211; *Meagher v. Hayes*, 152 Mass. 228; *Ekstrom v. Hall*, 90 Me. 186.

of *non assumpsit*, the cause came on for trial on the 27th of January, 1835. The plaintiff having proved the occupation of the premises by the defendant, during the term of three months, and the amount paid by him for the preceding quarters, the defendant offered to prove, in substance, that with the knowledge and approbation of Mr. and Mrs. Lloyd, he had erected upon the lot of ground, a frame stable, and two frame shops, and had made other improvements of the property; that it was agreed between them (the said Lloyd and wife, and White) that White was to have the liberty of selling or removing the stable, and that the shops were to be taken by the owners of the lots at a valuation, or if a valuation could not be agreed upon, that he was to have the privilege of removing the materials: That when the premises were put up at public sale, he requested the crier, by a written paper, to give notice of his claim, but the plaintiff's agent refused to permit the notice to be read: That the purchaser took possession of these buildings, with the other parts of the property, and still retains them.

The plaintiff's counsel objected to this evidence, and the court refused to receive it; upon which a bill of exceptions was tendered; and the jury having found for the plaintiff, the record was removed to this court.

The only question argued was the admissibility of the evidence in the court below.

Mr. Brooke, for the plaintiff in error.

Mr. Porter, for the defendant in error.

ROGERS, J. It is a general rule of the common law, that whatever is annexed to the inheritance during the tenancy, becomes so much a part of it, that it cannot be removed by the tenant, although the improvements may have been made at his own expense. As in *Warner v. Fleetwood*, 4 Rep. 63, glass put in by the tenant, or wainscot fastened by nails, was held part of the inheritance. To this rule there are certain exceptions, nearly as old as the rule itself, as between landlord and tenant, that whatever buildings or other fixtures are erected for the purpose of carrying on trade or manufactures, may be removed by the tenant *during the term*. The cases upon this subject are collected by Lord Ellenborough, in *Elwes v. Maw*, 3 East, 38; and by Mr. Justice Story, in *Van Ness v. Pacard*, 2 Peters' Rep. 145. As to substantial improvements, they are usually made a consideration for extending the term of the lease; or some collateral agreement is made, so as to allow of some compensation to the tenant. The latter was the course adopted by the parties to this contract. The tenant, White, erected on the premises several improvements, among which was a stable, and two shops, which, it is said, greatly enhanced the value. It was agreed at or about the time of the erection of these improvements, between White and Mr. and Mrs. Lloyd, who had an estate for life, that White was to have the liberty of selling or removing the stable, and that the barber's shop, and other small buildings erected by him were to be taken at a valuation; and that if a valuation should not be

agreed on, White was to have the privilege of removing the materials of the shops. As between the parties to this contract, this agreement was a good consideration; and any violation of it on the part of Lloyd, would have subjected him to an action. And I am inclined to believe, on the authority of *Van Ness v. Pacard*, that if the estate of Lloyd had continued until the end of the term, White would have had a right to remove the buildings from the premises, without the consent of the owner of the remainder, notwithstanding the general principle, that whatever is annexed to the freehold, becomes part of it, and cannot afterwards be removed, except by him who is entitled to the inheritance. The exception in favor of trade, which is founded on public policy, and intended to encourage manufactures and the improvements of the country, may well apply to this case; for the question does not depend, upon the size or form of the house, or the manner in which it is built; but the only inquiry always is, whether it was intended for purposes of trade or not; and I cannot believe that the nature of the business, whether agricultural or mercantile, can make any difference. But while these principles are conceded, I am unwilling to extend them beyond the duration of the estate which the tenant for life has in the premises, so as to subject the owner of the fee to payment for the buildings, or to compel him to allow them to be removed. In the case at bar, Lloyd's interest was in right of his wife, who had a life estate. On her death, the interest in possession vested in Arndt, the owner of the remainder in fee.

The death of Mrs. Lloyd put an end to White's lease. Now, there is no principle better established by authority than that, even as between landlord and tenant, fixtures must be removed *during the term*. After the term they become inseparable from the freehold, and can neither be removed by the tenant, nor recovered by him as personal chattels, by an action of trover, or for goods sold and delivered. 1 Atk. 477, *Ex parte Quincy*; 3 Atk. 13, *Lawton v. Lawton*, and the note; 2 Peters' R.; *Lord Dudley v. Lord Ward*, Ambl. 113; Co. Lit. 53 a; Brooke, Waste, 104, 142; *Cooper's Case*, Moore, 177; *Day v. Bisbitch*, Cro. E. 374; *Lord Derby v. Asquith*, Hob. 234; 4 Term Rep. 745; 7 Term Rep. 157.

It has been contended by the counsel for the plaintiff in error, that the tenant for life can bind the remainder-man by contract, so as to compel him either to pay for improvements which enhance the value of the property, or to permit them to be removed when it can be done without injury to the inheritance. For this position they rely on *Whiting v. Brastow*, 4 Pickering, 310, in which it is ruled, that a tenant for life, years, or at will, may at the determination of his estate remove such erections, &c., as were placed on the premises by himself, the removal of which will not injure the freehold, or put the premises in a worse plight than when he entered. In *Whiting v. Brastow*, the tenant removed a padlock used for securing a binn house, and movable boards fitted and used for putting up corn in bins. That was a

case between landlord and tenant, and not between tenant for life and the remainder-man; the rule being that, as between the latter, in questions respecting the right to what are ordinarily called fixtures, as between tenant for life or in tail and the remainder-man or reversioner, the law is considered more favorable than between landlord and tenant. It is construed most strictly between the executor and heir, in favor of the latter; more liberally between tenant for life or in tail and the remainder-man, or reversioner, in favor of the former; and with much greater latitude between landlord and tenant, in favor of the tenant. A distinction arises, also, between the cases, from the nature of improvements. In *Whiting v. Brastow*, the court treated the improvements as personal chattels; but this cannot be said of these erections which are of a permanent substantial kind, and which surely would not have gone to the executors of Mrs. Lloyd, if the buildings had been erected by her. It would have been waste in the tenant to have removed them; for it is in general true, that when a lessee having annexed anything to the freehold, during his term, afterwards takes it away, it is waste. Co. Lit. 53; Moore, 177; 4 Co. 64; Hob. 234.

Doty v. Gorham, 5 Pickering, 487, merely decides that a shop placed on the lands of the plaintiff, *with his permission*, was a chattel, and as such may be sold, on an execution against the owner, and that the purchaser has a right to enter on the land and remove the shop. This principle it is not necessary to controvert, as the application of it is not perceived.

It must be remarked, that the agreement does not purport to bind Arndt, the owner of the remainder in fee, and seems to have been made under the belief and with the wish, that the life interest would last as long as the lease, which was but for three years. But if the intention were to bind him, the objection arises, that it is not competent for them to make an agreement, to affect the inheritance. On the falling in of the particular estate, the remainder-man or reversioner is entitled to all the improvements, which the law denominates fixtures, without regard to the manner they are constructed, the persons who may have erected them, or whether they may contribute to enhance the value of the property or not. If the tenant for life, or the person with whom he contracts, wishes to avoid the consequences, the improvements must be removed during the continuance of the first estate; or the assent of the remainder-man, or reversioner, must be obtained. There is nothing which shows any assent to the agreement by Arndt. The deposition of Lloyd proves nothing further than that the rent was made known to Arndt, and that he made no objection against White being the tenant for the remainder of the lease. But not a word was said, so far as appears, about this agreement. It is in general true, that where there is a lease, for years, and by consent of both parties the tenant continues in possession afterwards, the law implies a tacit renovation of the contract. But that principle cannot fairly be made to apply to this case; for here, although the lease terminated at the death of Mrs. Lloyd, and the ten-

ant continued in possession with the consent of Arndt, yet that would bind the parties to nothing more than what came within the terms of the lease. It would not include the case of a collateral agreement, independent of the lease itself. The agreement on which this case turns, was a collateral agreement, of which it does not appear that Arndt was in any manner apprised, or to which there is not the slightest evidence he assented, either directly or by necessary implication.

*Judgment affirmed.*¹

WATRISS v. FIRST BANK OF CAMBRIDGE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1878.

[*Reported 124 Mass. 571.*]

CONTRACT for breach of a covenant contained in a written lease given by the plaintiff to the defendant, by which the lessee agreed "to quit and deliver up the premises to the lessor or her attorney peaceably and quietly at the end of the term, in as good order and condition . . . as the same now are." The breach complained of was the taking down and removal of a fire-proof safe and vault, a furnace with pipes and flues, and certain counters. The answer contained a general denial, and alleged that the defendant owned the property removed. Trial in this court, before *Ames, J.*, who reported the case for the consideration of the full court, in substance as follows:—

The plaintiff and one Hyde owned the premises as tenants in common, and by a lease dated January 1, 1861, demised them to the Harvard Bank for the term of five years, at the rent of \$300 a year. The lease contained a clause giving to the lessee the privilege, at its option, of renewing and extending its enjoyment of the premises for the additional term of five years upon the same terms; and the lessee agreed "to quit and deliver up the premises to the lessors or their attorney, peaceably and quietly, at the end of the term, in as good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties excepted, as the same now are or may be put into by the said lessors," "and not make or suffer any waste thereof;" "nor make or suffer to be made any alteration therein, but with the approbation of the lessors thereto in writing having been first obtained;" and giving the lessors the right to enter to view and make improvements, and expel the lessee if it should fail to pay the rent as aforesaid, or to make or suffer any strip or waste thereof.

The lessee thereupon constructed in the building a fire-proof safe or vault, for the safe keeping of money, books, and securities; also a portable furnace in the basement, with the necessary pipes, flues, and

¹ See *Haflick v. Stober*, 11 Ohio St. 482.

registers for warming its rooms; and certain counters. The premises were occupied by the lessee as its banking rooms.

On May 16, 1864, the lessee was organized as a national bank under the laws of the United States, and its name was changed to the First National Bank of Cambridge, but there was no other change of its identity. In the course of the first term, a partition was duly had between Hyde and the plaintiff, by virtue of which the plaintiff became the sole owner of the premises. Before the expiration of the term, the defendant elected to continue to hold under the lease for the five additional years, and a new lease was executed between the parties to this action, bearing date October 7, 1870, granting to the defendant a further term of five years from January 1, 1871, at the rent of \$800 a year. This lease contained the same clauses above quoted from the lease of January 1, 1861, and the following additional clause: "And provided also, that in case the premises, or any part thereof, during said term, be destroyed or damaged by fire or other unavoidable casualty, so that the same shall be thereby rendered unfit for use and habitation, then, and in such case, the rent hereinbefore reserved, or a just and proportional part thereof, according to the nature and extent of the injuries sustained, shall be suspended or abated until the said premises shall have been put in proper condition for use and habitation by the said lessor, or these presents shall thereby be determined and ended, at the election of the said lessor or her legal representatives."

On or about November 5, 1875, the defendant, having concluded to remove its business to another building, proceeded to take down the vault, and remove the materials of which it was composed, and also the furnace, pipes, flues, registers and counters to its new banking rooms, contending that it had a right so to do.

It was agreed that the damage done by this proceeding to the building, if the property so removed could lawfully be considered as fixtures which the defendant, as an outgoing tenant, had a right to remove, was \$75; that the plaintiff was entitled, at all events, to recover that sum, with interest; and that the building could for that sum be restored to the same good order and condition as it was in at the date of the first lease. The jury returned a verdict for the plaintiff for \$75, and the judge reported the case for the consideration of the full court. If the plaintiff was entitled to recover a greater sum than the amount of the verdict, and if the alleged fixtures were removed wrongfully and in violation of her rights, the case was to stand for trial; otherwise, judgment was to be entered on the verdict.

S. H. Dudley, for the plaintiff.

J. W. Hammond, for the defendant.

ENDICOTT, J. It is stated in the report that the Harvard Bank, soon after taking possession of the premises under the lease of January 1, 1861, put in a counter, a portable furnace with its necessary connections, and a fire-proof safe or vault, for the removal of which, in 1875, this action is brought. In 1864, the Harvard Bank was organized as

the First National Bank of Cambridge. No question is made that all the proceedings were according to law. The right to the personal property of the old bank passed, therefore, to the defendant upon the execution of the necessary papers and the approval of the proper officers; no other assignment was necessary. *Atlantic National Bank v. Harris*, 118 Mass. 147, 151.

The right of the defendant to occupy the premises under the lease to the Harvard Bank for five years, and to exercise the option contained in the lease to hold the premises for five years more at the same rent, seems to have been conceded by the lessors; for the defendant continued in possession, paying rent during the whole term of ten years contemplated by the lease, which expired January 1, 1871. We must assume that the title, not merely to movable chattels upon the premises, but also to trade fixtures put in by the Harvard Bank, passed to the defendant, as the plaintiff does not deny that the defendant could have removed such of the articles as are trade fixtures at any time before the final expiration of the lease on January 1, 1871.

In October, 1870, about three months before the final expiration of the term of the old lease, the plaintiff, one of the original lessors, who had in the mean time acquired the whole title to the premises, executed a new lease to the defendant, then in occupation, for a much higher rent, containing different stipulations from those in the old lease, particularly in regard to abatement of rent in case of fire. This lease was to take effect January 1, 1871, but made no reference to the existing lease, or to the removal of any trade fixtures then upon the premises. It was in no proper sense a renewal of the old lease. It contained the usual covenants on the part of the lessee to quit and deliver up the premises at the end of the term in as good order and condition "as the same now are." Although executed before the expiration of the earlier lease, it can have no other or different effect than if given on the day it was to become operative, and its stipulations and conditions are to be considered as if made on that day. And the question arises whether the acceptance of the new lease and occupation under it on January 1, 1871, was equivalent to a surrender of the premises to the lessor at the expiration of the first term. If it did amount to a surrender, it is very clear that the defendant could not afterwards recover the articles alleged to be trade fixtures.

The general rule is well settled that trade fixtures become annexed to the real estate; but the tenant may remove them during his term, and if he fails to do so, he cannot afterwards claim them against the owner of the land. *Poole's Case*, 1 Salk. 368; *Gaffield v. Hapgood*, 17 Pick. 192; *Winslow v. Merchants' Ins. Co.*, 4 Met. 306, 311; *Shepard v. Spaulding*, 4 Met. 416; *Bliss v. Whitney*, 9 Allen, 114, 115, and cases cited: *Talbot v. Whipple*, 14 Allen, 177; *Lyde v. Russell*, 1 B. & Ad. 394; Baron Parke in *Minshall v. Lloyd*, 2 M. & W. 450. This rule always applies when the term is of certain duration, as under a lease for a term of years, which contains no special

provisions in regard to fixtures. But where the term is uncertain, or depends upon a contingency, as where a party is in as tenant for life, or at will, fixtures may be removed within a reasonable time after the tenancy is determined. *Ellis v. Paige*, 1 Pick. 43, 49; *Doty v. Gorham*, 5 Pick. 487, 490; *Martin v. Roe*, 7 E. & B. 237. See also *Whiting v. Brastow*, 4 Pick. 310, 311, and note.

There is another class of cases which forms an exception to the general rule. Where a lease was given by an agent without sufficient authority during the absence of the owner, and was terminated by the owner on his return from abroad, it was decided by this court that the lessees became tenants at sufferance and could remove their fixtures within a reasonable time after such termination. *Antoni v. Belknap*, 102 Mass. 193. In *Penton v. Robart*, 2 East, 88, it was held that a tenant, who had remained in possession after the expiration of the term, had the right to take away his fixtures, and Lord Kenyon said, "He was in fact still in possession of the premises at the time the things were taken away, and therefore there is no pretence to say that he had abandoned his right to them." In *Weeton v. Woodcock*, 7 M. & W. 14, a term under a lease had been forfeited by the bankruptcy of the lessee, and the lessor entered upon the assignees to enforce the forfeiture, and it was held that they might have a reasonable time to remove fixtures; and Baron Alderson said that "the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him, as he holds the premises under a right still to consider himself as tenant." Mr. Justice Willes, commenting on these last two cases, in *Leader v. Homewood*, 5 C. B. (N. S.) 546, said: "It is perhaps not easy to understand fully what is the exact meaning of this rule, and whether or not it justifies a tenant who has remained in possession after the end of his term, and so become a tenant at sufferance, in severing the fixtures during the time he continues in possession as such tenant. But the rule, whatever its exact meaning may be, is plainly inconsistent with the argument relied on by the counsel for the plaintiff in the present case, viz., that the right of the tenant continues till he has evinced an intention to abandon his right to the fixtures." In *Mackintosh v. Trotter*, 3 M. & W. 184, Baron Parke, after stating that whatever is planted in the soil belongs to the soil, remarked "that the tenant has the right to remove fixtures of this nature during his term, or during what may, for this purpose, be considered as an excrescence on the term." He also refers to *Minshall v. Lloyd*, 2 M. & W. 450, as authority, wherein he stated in the most emphatic manner that "the right of a tenant is only to remove during his term the fixtures he may have put up, and so to make them cease to be any longer fixtures." It is clear from these cases that the right of a tenant, in possession after the end of his term, to remove fixtures within a reasonable time, does not rest merely on the fact that he is in occupation, or has not evinced an intention to abandon, but because he is still, in contemplation of law, in occupation as

tenant under the original lease, and, as Baron Parke says, under what may be considered an excrescence on the term, that is, as tenant at sufferance.

But a very different question is presented when the same tenant continues in possession under a new lease containing different terms and conditions, making no reference to the old lease, reserving no rights to the lessee in fixtures annexed during the previous term and not removed before its expiration, and containing the covenant to deliver up the premises at the end of the term in the same condition. This is not the extension of or holding over under an existing lease ; it is the creation of a new tenancy. And it follows that whatever was a part of the freehold when the lessee accepted and began his occupation under the new lease must be delivered up at the end of the term, and cannot be severed on the ground that it was put in, as a trade fixture, under a previous lease, which has expired. The failure of the lessee to exercise his right to remove during the former term, or to reserve it in his new contract, precludes him from denying the title of his landlord to the estate and the fixtures annexed which have become part of it. The occupation under the new lease is in effect a surrender of the premises to the landlord under the old.

This view is supported by the authorities. The earliest case on the subject is *Fitzherbert v. Shaw*, 1 H. Bl. 258. A purchaser of lands having brought ejectment against a tenant from year to year, the parties entered into an agreement that judgment should be signed for the plaintiff, with a stay of execution for a given period ; and it was held that the tenant could not, during the interval, remove the fixtures erected during the term, and before action brought, — on the ground that the tenant could do no act to alter the premises in the mean time, but they must be delivered up in the same situation they were in when the agreement was made and the judgment signed. This case was followed in *Heap v. Barton*, 12 C. B. 274, where there was a similar agreement, and Jervis, C. J., said that “if the tenants meant to avail themselves of their continuance in possession to remove the fixtures, they should have said so.” In *Thresher v. East London Waterworks*, 2 B. & C. 608, it was held that a lessee, who had erected fixtures for purposes of trade on the premises, and afterward took a new lease, to commence at the expiration of the former one, which contained a covenant to repair, would be bound to repair the fixtures, unless strong circumstances were shown that they were not intended to pass under the general words of the second demise ; and a doubt was expressed whether any circumstances, *dehors* the deed, can be alleged to show they were not intended to pass. The case of *Shepard v. Spaulding*, 4 Met. 416, touches the question. A lessee erected a building on the demised premises, which he had a right to remove, but surrendered his interest to the lessor without reservation ; afterward he took another lease of the premises from the same lessor, but it was held that his right to remove did not revive. When the new lease was made, it was

of the whole estate, including the building. This differs from the case at bar only in the fact that there was an interval between the surrender of the interest under the first lease and the granting of the second, when the lessor was in actual possession. But the acceptance of the new lease and occupation under it are equivalent to a surrender of the premises at the end of the term. In *Loughran v. Ross*, 45 N. Y. 792, it was held that, if a tenant, having a right to remove fixtures erected by him on the demised premises, accepts a new lease of such premises, including the buildings, without reservation or mention of any claim to the buildings, and enters upon a new term thereunder, the right to removal is lost, notwithstanding his occupation has been continuous. See also *Abell v. Williams*, 3 Daly, 17; *Merritt v. Judd*, 14 Cal. 59; *Jungerman v. Bovee*, 19 Cal. 354; *Elwes v. Maw*, 3 East, 38; Taylor on Landlord and Tenant (5th ed.), § 552; 2 Smith's Lead. Cas. (7th Am. ed.) 228, 245, 257.

We are therefore of opinion that the defendant had no right during the second term to remove any trade fixtures placed there during the first. If any of the articles named were movable chattels, as the defendant contends, the plaintiff cannot recover for them; but if they were permanent or trade fixtures, the plaintiff may recover for their removal.

*Case to stand for trial.*¹

D. *Transfer of Fixtures.*

HALLEN v. RUNDER.

EXCHEQUER. 1834.

[Reported 1 C. M. & R. 266.]

ASSUMPSIT. The first count of the declaration stated, that, in consideration that the defendant had bargained for, and bought of the plaintiff, and that the plaintiff, at the request of the defendant, had sold to the defendant divers chattels, fixtures, and effects, then lying and being in and fastened to a certain dwelling-house and premises, at and for a certain price, to wit, the price of £40 10s.; the defendant undertook to pay the said sum of £40 10s., when he should be thereunto afterwards requested; and that, although the plaintiff afterwards requested the defendant to pay him the said sum of £40 10s., yet, that the defendant did not, nor would then or at any other time, pay him the same or any part thereof. The second count was in *indebitatus assumpsit*, for the price and value of goods, chattels, fixtures, and effects,

¹ And see *Loughran v. Ross*, 45 N. Y. 792; *Talbot v. Cruger*, 151 N. Y. 117; *Carlin v. Ritter*, 68 Md. 478; *Bauernschmidt v. McColgan*, 89 Md. 185; *Sanitary Dist. v. Cook*, 169 Ill. 184. But see *Kerr v. Kingsbury*, 39 Mich. 160; *Lewis v. Ocean Nav. Co.*, 125 N. Y. 341, 349; *Bernheimer v. Adams*, 70 N. Y. Ap. D. 114; *Second Nat. Bank v. Merrill*, 69 Wis. 501; *Wright v. Macdonnell*, 88 Tex. 140. In Maryland, the matter is now regulated by statute; see *Bauernschmidt v. McColgan*, *supra*.

bargained and sold, and for the price and value of other goods, chattels, fixtures, and effects sold and delivered, and for money lent, money paid, money had and received, and for money due upon an account stated. The defendant pleaded the general issue.

At the trial, before *Gurney*, B., at the sittings in London, after last Michaelmas Term, it appeared in evidence that the plaintiff had for several years, prior to the 25th of March, 1833, occupied a house in Nelson Square, under the defendant, and that a few days before that day, when the plaintiff was on the point of removing to another house, the defendant called upon the plaintiff, and requested him not to remove the fixtures, saying, she would take them at a fair valuation; and it was agreed that each party should appoint their own broker. It further appeared, that, when the plaintiff entered the house as tenant to the defendant, he had paid £23 for fixtures to the out-going tenant; and that prior to his quitting the house, he had added very considerably to the quantity of fixtures. The plaintiff gave up possession of the house on the 24th of March, leaving the fixtures on the premises. On the following day, the plaintiff sent for, and obtained the key of the house from the defendant's son, for the purpose of having the fixtures valued, and the key was accordingly delivered to the plaintiff's broker, who, together with one Sexton, a broker, who met him there on the defendant's behalf, valued the whole of the fixtures at £40 10s., and they both signed the appraisement at that valuation. After the valuation was made, the key was returned to the defendant. On the trial it was proved by Sexton, the defendant's broker, that the defendant had desired him to go to the house in question to look at some fixtures and stoves; that she said, she did not know whether she would agree with the plaintiff for them or not, but that he was to appraise them. It was objected for the defendant, first, that there was no contract in writing proved, inasmuch as the appraisement was not signed by the defendant, or by her authority, and therefore that the sale was void under the 17th section of the Statute of Frauds; and, secondly, that this form of action was not maintainable: that the fixtures, not having been severed, continued to be part of the freehold, and could not be considered as goods and chattels; and therefore, that *indebitatus assumpsit* was not maintainable, and that the action ought to have been special on the agreement. The learned Baron told the jury that if they believed that the defendant had authorized the broker to appraise the fixtures, he was of opinion that she had given him authority to sign the appraisement; and consequently, that there was a sufficient note in writing, if that were necessary. The jury found a verdict for the plaintiff for the amount of the valuation. The learned judge gave the defendant leave to move to enter a nonsuit; and accordingly in Hilary term last —

F. Kelly, moved either for a nonsuit or a new trial. The court granted a rule *nisi*, against which,

Thesiger and *Petersdorff*, showed cause.

Kelly, in support of the rule.

The judgment of the court was delivered by PARKE, B. In this case, which was argued before my Brothers Bolland, Alderson, Gurney, and myself, all the questions were disposed of by the court in the course of the argument except one; namely, whether the plaintiff could recover the amount of the valuation of the fixtures upon any count in this declaration. The first count stated, that in consideration that the defendant had bargained for and bought of the plaintiff, and that the plaintiff, at the request of the defendant, had then and there sold to the defendant divers chattels, fixtures, and effects, then lying in and being fastened to a certain dwelling-house and premises, at the price of £40 10s., the defendant undertook to pay the price so agreed upon. The second count stated that the defendant was indebted to the plaintiff in £50 for the price and value of goods, chattels, fixtures, and effects, bargained and sold by the plaintiff to the defendant at her request; and in the like sum for the price and value of other goods, chattels, fixtures, and effects, sold and delivered by the plaintiff to the defendant at her request; and in the like sum upon an account stated; and the question is, whether these counts, or any part of them, are applicable to the plaintiff's case. We think that the first count, or that part of the second count which charges the defendant with the price and value of fixtures bargained and sold, or indeed that which states her to be indebted for fixtures sold and delivered, is upon the evidence supported, and it is unnecessary to say whether the other part of the second, upon the account stated, was or was not sustained. The situation of the plaintiff was this, upon entering as tenant to the defendant, he had paid upwards of £20 for the interest which a former tenant had in certain chattels which had been annexed to the freehold, but which that tenant had a right to sever and remove whenever he pleased during his term; and the plaintiff had also, during his term, annexed other chattels to the freehold, which also he had the like right of removing. Shortly before the expiration of this term, the plaintiff agreed with the defendant, his lessor, that he should forbear to remove all these chattels so annexed, which he was about to do, and that they should be taken by the defendant on a valuation to be made by two appraisers. This valuation was ascertained by two brokers, both of whom must, upon the finding of the jury, be taken to have been properly appointed for this purpose: the value was fixed at £40 10s. The plaintiff left the chattels attached to the freehold, and the defendant took possession of them.

When chattels are thus fixed to the freehold by a tenant, they become part of it, subject to the tenant's right to separate them during the term, and thus reconvert them into goods and chattels, as stated by Lord Chief Justice Gibbs in *Lee v. Risdon*, 7 Taunt. 191, and in the very able work of Messrs. Amos & Ferard on Fixtures; but, whilst annexed, they may be treated for some purposes as chattels: for instance, in the execution of a *fi. fa.* they may be seized and sold as falling under the description of goods and chattels — *Poole's Case*, 1 Salk.

368 — in like manner as growing crops of corn or other *fructus industriales*, which go to the executor, and to which they bear a close resemblance. The case above cited of *Lee v. Risdon*, however, decides that they cannot be treated as goods in an action for the price; and although in the subsequent case of *Pitt v. Shew*, 4 B. & A. 206, they were held to fall under the description of “goods, chattels, and effects” in an action of trespass, we cannot consider the previous authority as overruled, because in the latter case it is probable that the articles taken had been severed from the freehold before the sale by the defendant, though Lord Chief Justice Abbott certainly does not mention that circumstance as the ground of the decision.

The plaintiff, therefore, cannot recover the price fixed for these effects as for goods sold and delivered; but the question is, whether he cannot as for fixtures bargained and sold, or sold and delivered. The real nature of the contract between the plaintiff and the defendant was, that the plaintiff should waive his right of removal, and thereby give up to the defendant all his interest in and right to enjoy these effects as chattels. And after the contract is executed, and the plaintiff has given up possession to the defendant, the question is, whether he may not declare as for fixtures bargained and sold, or sold and delivered. The term “fixtures” has now acquired the peculiar meaning of personal chattels which have been annexed to the freehold, but which are removable at the will of the person who has annexed them, in which sense it is used in the Treatise on Fixtures above referred to. And it has certainly been the practice, since the decision in *Lee v. Risdon*, to declare for the amount of valuations of such fixtures between one tenant and another, or the tenant and landlord, in a count in *indebitatus assumpsit* for fixtures. Although this may not be the most accurate mode of describing the real contract between the parties, we think it is sufficient, and that the plaintiff may recover upon it; and the case bears a strong analogy to that of a contract by a tenant to give up to his landlord or successor those growing crops to which he is entitled by the common law or the custom of the country, as emblements, and the value of which after the contract is executed may certainly be recovered on a count for crops bargained and sold. See *Mayfield v. Wadsley*, 3 B. & C. 357; 5 D. & R. 224. This question on the form of the declaration was indeed decided by the court on a motion for a rule *nisi*; but as it was suggested by the learned counsel for the defendant, that the court so decided under the impression that this was a sale of an interest in land, within the 4th section of the Statute of Frauds, leaving the point to be discussed whether the appraisement was a sufficient memorandum in writing, we have allowed the point to be argued, and given it full consideration, and decided it. We are quite satisfied that this is not a sale of any interest in land, for the reasons given in the course of the arguments; and the judgment of the court, and particularly of Mr. Justice Littledale in *Evans v. Roberts*, 5 B. & C. 829; 8 D. & R. 611, upon the subject of growing crops, is an authority to the same effect;

but treating this as not being a sale of any interest in land, we think the declaration is sufficiently adapted to the case.

*Rule discharged.*¹

BOSTWICK v. LEACH.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1809.

[*Reported 3 Day, 476.*]

MOTION for a new trial.

This was an action of *assumpsit*.

The declaration stated, that the plaintiff was the owner of a grist-mill; and the defendant, having it in contemplation to build one within a short distance, and being desirous of procuring materials for it, as well as of securing to it, when built, the custom of such persons as usually went for grinding to the plaintiff's mill, proposed to the plaintiff that he should stop his mill on the first day of January then next, and the defendant would purchase the mill-stones, running-geers, bolt, tackling, tools and utensils, which belonged to and were removable from the mill, and would pay the plaintiff for the same the sum of four hundred dollars. To this proposition the plaintiff acceded, and had performed everything to be done on his part.

The defendant pleaded the general issue.

On the trial the plaintiff offered to prove his case by parol evidence. It was agreed, that the plaintiff's mill was what is commonly called a gig mill, standing on a small stream of water; that the mill-stones were laid in the mill for the purpose of grinding in the same manner as mill-stones are usually placed in such mills for that purpose, — viz., by the bed stones being laid upon the floor timber of the mill; that the running geers consisted of a horizontal water-wheel, the shaft of which was upright, which passed through the lower mill-stone for the purpose of turning the upper mill-stone; that the lower part of the shaft rested and turned on a pivot at the bottom; and that the wheel was turned by the water being received in the usual manner of mill-wheels of that description. It was also agreed, that the mill-stones, running-geers, &c., were, at the time of the contract, in actual use for the purpose of grinding, and have never since been removed, but might be removed without doing violence to the mill-house, and without even so much as the drawing of a nail. It was further admitted that the plaintiff stopped his mill on the first day of January, according to his agreement, and the next day gave notice thereof to the defendant.

The defendant objected to the admission of the evidence offered, on the ground that the contract set forth in the declaration, and offered to

¹ Followed in *Lee v. Gaskell*, 1 Q. B. D. 700. See *South Balto. Co. v. Muhlback*, 69 Md. 395, 404.

be proved, was a contract for the sale of lands, tenements, or hereditaments, or some interest in or concerning them; and not being in writing, was, therefore, within the Statute of Frauds and Perjuries. But the court overruled the objection, and admitted the evidence.

A verdict being found for the plaintiff, the defendant moved for a new trial.

N. Smith and Hatch, in support of the motion.

Bacon, in the absence of *Allen*, opposed the motion.

BY THE COURT. The contract was not embraced by the Statute of Frauds and Perjuries. When there is a sale of property, which would pass by a deed of land, as such, without any other description, if it can be separated from the freehold, and by the contract is to be separated, such contract is not within the Statute. Such are the contracts for the purchase of gravel, stones, timber trees, and the boards and brick of houses to be pulled down and carried away.

The agreement not to use his mill, after a certain day, is not within the Statute of Frauds and Perjuries; for this Statute contemplates only a transfer of lands, or some interest in them. In this case, there was no transfer of any right, but only an agreement not to exercise a right. He parts with no interest to any person. There is no conveyance of the stream, or indeed of any interest whatever. Thus, it differs nothing in principle from the case where a man has carried on a trade in his house, or shop, and agrees, for a valuable consideration, not to carry on his business at that particular stand; and yet such contract has never been held to be within the Statute.

*New trial not to be granted.*¹

¹ See *Moody v. Aiken*, 50 Tex. 65.

CHAPTER V.

EMBLEMENTS.

LIT. § 68. Tenant at will is, where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called tenant at will, because he hath no certain nor sure estate, for the lessor may put him out at what time it pleaseth him. Yet if the lessee soweth the land, and the lessor, after it is sown and before the corn¹ is ripe, put him out, yet the lessee shall have the corn, and shall have free entry, egress and regress to cut and carry away the corn, because he knew not at what time the lessor would enter upon him. Otherwise it is if tenant for years, which knoweth the end of his term, doth sow the land, and his term endeth before the corn is ripe. In this case the lessor, or he in the reversion, shall have the corn, because the lessee knew the certainty of his term, and when it would end.²

Co. LIT. 55 a, 55 b. “*Yet if the lessee soweth the land, and the lessor after it is sown, &c.*” The reason of this is, for that the estate of the lessee is uncertain, and therefore lest the ground should be unmanured, which should be hurtful to the Commonwealth, he shall reap the crop which he sowed in peace, albeit the lessor doth determine his will before it be ripe. And so it is if he set roots, or sow hemp or flax, or any other annual profit, if after the same be planted, the lessor oust the lessee; or if the lessee dieth, yet he or his executors shall have that year’s crop. But if he plant young fruit trees, or young oaks, ashes, elms, &c., or sow the ground with acorns, &c., there the lessor may put him out notwithstanding, because they will yield no present annual profit. And this is not only proper to a lessee at will, that when the lessor determines his will that the lessee shall have the corn sown, &c., but to every particular tenant that hath an estate uncertain, for that is the reason which Littleton expresseth in these words (*because he hath no certain nor sure estate*). And therefore if tenant for life soweth the ground and dieth, his executors shall have the corn, for that his estate was uncertain, and determined by the act of God. And the same law is of the lessee for years or tenant for life.³ So if a man be seised of

¹ Where possession is taken under a parol contract of sale of the land, and the vendee sows, he is entitled to the crop against the vendor who afterwards repudiates the contract. *Harris v. Frink*, 49 N. Y. 24.

² In tenancies for years the law is otherwise in Pennsylvania. *Stultz v. Dickey*, 5 Binn. 285 (1812). And see *Van Doren v. Everitt*, 2 South. 460.

³ See *Bradley v. Bradley*, 56 Conn. 374.

land in the right of his wife, and soweth the ground, and he dieth, his executors shall have the corn, and if his wife die before him he shall have the corn. But if husband and wife be joint-tenants of the land, and the husband soweth the ground, and the land surviveth to the wife, it is said that she shall have the corn. If tenant *pur terme d'auter vie* soweth the ground, and *cestuy que vie* dieth, the lessee shall have the corn. If a man seised of lands in fee hath issue a daughter and dieth, his wife being *enseint* with a son, the daughter soweth the ground, the son is born, yet the daughter shall have the corn, because her estate was lawful, and defeated by the act of God, and it is good for the Commonwealth that the ground be sown. But if the lessee at will sow the ground with corn, &c., and after he himself determine his will and refuseth to occupy the ground, in that case the lessor shall have the corn,¹ because he loseth his rent. And if a woman that holdeth land *durante viduitate sua* soweth the ground and taketh husband, the lessor shall have the emblements, because that the determination of her own estate grew by her own act. But where the estate of the lessee being uncertain is defeasible by a right paramount, or if the lease determine by the act of the lessee, as by forfeiture, condition, &c., there he that hath the right paramount, or that entereth for any forfeiture, &c., shall have the corn.

MR. SPENCER'S CASE.

COMMON PLEAS. 1622.

[Reported Winch, 51.]

Harvy, Serjeant, came to the bar, and demanded this question of the court, in the behalf of Mr. Spencer: A man was seised of land in fee, and sowed the land, and devised that to I. S., and before severance he died; and whether the devisee shall have the corn, or the executor of the devisor, was the question; and by HOBERT, WINCH, and HUTTON, the devisee shall have that, and not the executor of the devisor; and HARRIS said, 18 Elizabeth, *Allen's Case*, that it was adjudged, that where a man devised land which was sowed for life, the remainder in fee, and the devisor died, and the devisee for life also died before the severance, and it was adjudged that the executor of the tenant for life shall not

¹ See *Oland v. Burdwick*, Cro. EL. *460.

"In relation to emblements, the right of the tenant was unquestionably conferred for the encouragement of agriculture; but this right has never been held to obtain until the seed is sown, and the common law has drawn a distinction between the right to emblements and the costs of the preparation of the ground for the reception of the seed; as where the tenant for will is ousted after ploughing and manuring the land, he wholly loses his costs and labor, although if he had planted he would have been entitled to the emblements. Bro. Ab. Tit. Emblements, 7. If, therefore, the term of the lessee was determined by the death of the tenant for life, he would only be entitled to the emblements of the land then seeded." GOLDTHWAITE, J., in *Price v. Pickett*, 21 Ala. 741, 743.

have that, but he in remainder; and WINCH, Justice, said that it had been adjudged, that if a man devise land, and after sow that, and after he dies, that in this case the devisee shall have the corn, and not the executor of the devisor, *nota bene*.¹

LATHAM v. ATWOOD.

KING'S BENCH. 1638.

[*Reported Cro. Car.* 515.]

TROVER and conversion of two hundred and fifty pounds of hops. Upon not guilty pleaded, the case appeared to be:

A woman, tenant for life, takes to husband the plaintiff, 5 Car. 1, the remainder being to the defendant for his life. These hops were growing out of ancient roots, being within the land in question; the wife dies the 19th August, 9 Car. 1, the hops then growing and not severed, &c.

The question was, Whether these hops appertained to the husband or to him in remainder? because she died so small a while before the gathering of them; and they are such things as grow by manurance and industry of the owner, by the making of hills and setting poles.

THE COURT, upon the motion of *Grimston*, who was of counsel with the plaintiff, held, that they are like emblements, which shall go to the husband or executor of the tenant for life, and not to him in remainder; and are not to be compared to apples or nuts, which grow of themselves. Wherefore adjudged for the plaintiff.

PEACOCK v. PURVIS.

COMMON PLEAS. 1820.

[*Reported 2 Brod. & B.* 362.]

REPLEVIN for growing corn. Cognizances for half a year's rent, due the 12th of May, 1819. Pleas. First, *non tenuit*; second, a writ of *feri facias* sued upon a judgment recovered by the plaintiff, in Hilary term, 1819, against W. Peacock, under which the sheriff seized the corn on the 28th April, 1819, and, having paid the landlord one year's rent, sold the corn (not saying by agreement in writing) to the plaintiff, who then became possessed of the same. There were also pleas, stating a custom for a waygoing crop. General demurrer and joinder.

Hullock, Serjeant, for the defendant.

D' Oyley, Serjeant, for the plaintiff.

¹ See *Anon.*, Cro. El. 61.

DALLAS, C. J. Though this question is not altogether new, there certainly are no decisions expressly in point. But different cases have been referred to : first, one in Willes ; next, a case containing a *dictum* of the late Lord Chief Baron ; and I shall begin by adverting to these, before I proceed to investigate the principles on which the present case must turn. In the case in Willes, the question now before us was not decided, although it was presented for the consideration of the court ; because, upon the facts of that case, it became unnecessary to decide it. But it was certainly stated, that if the present question should occur, "it might have required very good consideration, it being a point of great consequence. That goods taken in execution, or even goods distrained damage feasant, are in the custody and under the protection of the law, and, therefore, cannot be distrained for rent, is expressly holden in Co. Lit. 47 a, and several other books ; and we are inclined to be of this opinion." "But we think we have no occasion to enter any further into this matter, because we are all clearly of opinion, that if there had been no execution in the present case, yet the corn could not be distrained." That case, therefore, only proves the court to have thought, that this point, if presented for decision, would have required their best consideration. *Guilliam v. Barker* was similar in fact, to the present case, though the question before the court in that case is not the question here.

It is admitted that a *dictum* is to be found in that case, in favor of the landlord's right to distrain, but that was not the point on which the decision turned ; and this *dictum* of a moment is perhaps impaired by what follows. "I do not think the statute applies to corn in the blade ; it would be a monstrous thing to cut it in such a state." So that it seems inconsistent with the argument used to-day, and with the statute, because by the statute, corn in the blade may be distrained. This, therefore, being a new question, that is, a new question in judgment, and one on which no express decision can be found, we must recur to principle, in order to arrive at a decision ; and, in considering the point on principle, we must look to the reason and sense of the thing. With respect to an execution on goods, the course of the sheriff is clear and easy ; he seizes, makes a bill of sale, delivers the goods to the purchaser, and retires ; and why does he deliver the goods ? because he can deliver them, and is therefore bound to do so : that makes it necessary for us to consider the distinction between goods and growing corn. It is admitted, the law authorizes growing corn to be seized ; and why ? To satisfy the judgment.

But the writ of *fiery facias* would be quite nugatory towards such a purpose, in a case like the present, if the right of the party were to cease the moment the bill of sale is executed, and if he were not allowed to wait till the corn became ripe and valuable, in order to reap the benefit of his purchase. With respect to goods, it is true, the sheriff, or the person purchasing of him, is bound to remove them within a reasonable time ; but it is to the delivery that the law looks,

and that must be made within a reasonable time ; so here, the sheriff is bound to deliver, and in a reasonable time ; but being so bound, when is it he can deliver ? when the corn is ripe ; and, after that period, it must not remain an unreasonable time. The question, therefore, always is, What is a reasonable time for delivery ? and I fully agree with the counsel for the plaintiff, that the delivery of the crop and the satisfaction of the judgment, are the objects of the law ; that not only things actually in the hands of the sheriff are in *in custodia legis*, but that, virtually, all things taken in execution remain in such custody till the sheriff can deliver them, so as to give effect to the judgment. If there be any doubt as to this, we should refer to the statutes respecting landlords ; by those statutes, growing corn is considered as goods ; and the provisions touching a distress of such corn are, that it is to be distrained as if it were goods and chattels. I put, therefore, the same construction on this case, in favor of creditors, as obtains, under the Statutes, in favor of landlords. My opinion clashes with no authority ; and being called on to decide on principle, I think, on principle, the defendant had no right to distrain.

PARK, J. The question was well put by the counsel for the defendant, with the addition which was made by my Brother Burrough ; and that is the fair question in this case. If the decision of the court were any other than it is to be, the effect of the law would be entirely destroyed ; because, how could the law be available to execution, if those who purchased under a sheriff were not allowed to retain what they had bought ? But the doctrine is not entirely new ; for, though there was no direct decision on the point in the case in Willes, the language of the court there, is a pretty strong argument, to show that their opinion was against what the defendant contends for. I agree with the counsel for the plaintiff in his argument, that if the law authorizes this property to be taken under an execution, it authorizes everything which will make that execution available. Here, all was done which was requisite to render the seizure legal ; the landlord had his deduction fairly allowed at the time, and the purchaser must be allowed to retain what the law has given him.

BURROUGH, J. I have a high opinion of whatever proceeded from the late Chief Baron Thompson, but I do not think that which has been ascribed to him was his deliberate opinion ; and the intimation of the court in Willes is an authority the other way. I am clearly of opinion that these goods were in the custody of the law. For, how does the case stand ? Here is a judgment creditor, who purchases growing corn under an execution, but he has no satisfaction till the corn is carried away, and till then, he is under the protection of the law. The case of assignees and executors differs from the present ; they stand only in the place of the bankrupt and testator, and there is a continuation of the same right of property ; here, the property is transferred from one hand to another. Supposing we were not to decide as we have done, it would only alter the practice, and cause executions to be kept alive

from term to term, it being clear that the landlord is entitled to no more than one year's rent on the execution of a *fiery facias*.

RICHARDSON, J. I am of opinion, that crops in the hand of the sheriff's vendee are protected from distress; and this is a necessary consequence of allowing such crops to be liable to seizure. That, however, is clearly so, though little on the subject is to be found in the books. It has always been held as undoubted, which perhaps is the reason why so little appears; such crops are *fructus industriales*, which would go to the executor, and therefore have been considered seizable as goods and chattels. But, where the law authorizes a seizure, it authorizes all that which will make the seizure available. Now here the seizure would be utterly unavailable, if the purchaser could not retain that which he bought under the sheriff's sale. *Eaton v. Southby* [Willes, 131], comes very near the present case, though there it was not necessary to decide the point; but the Chief Justice, in delivering the judgment of the court, thought growing crops might be protected after sale by the sheriff. Though the Statute of 11 Geo. 2, gives landlords great powers, which they did not possess before, yet it only enabled them to distrain crops in the same manner as other goods. But other goods must always be taken as subject to any prior rights which may have attached to them: here, a right had attached to the crop in question, incompatible with the landlord's distress. In order, therefore, to make the writ of *fiery facias* available to the purposes for which, by law, it was intended, there must be, in this case,

Judgment for the plaintiff.

DAVIS v. EYTON.

COMMON PLEAS. 1830.

[Reported 7 Bing 154.]

TINDAL, C. J.¹ In this case the tenant, White, held as lessee from year to year, subject to a condition of re-entry by the lessor, which was as follows: — “That if the lessee should commit an act of bankruptcy, whereon a commission should issue, and he should be declared bankrupt, or if he should become insolvent, or incur any debt upon which any judgment should be signed, entered up, or given against him, and on which any writ of *fiery facias*, or other writ of execution should issue, it should be lawful for the lessor to re-enter into the demised premises, and the same again to have, re-possess, and enjoy, as in his former estate.”

It appears that on the 11th of May the lessor entered for what he alleges to have been a breach of condition, namely, that the lessee

¹ Only the opinions are printed.

contracted a debt, upon which he was sued to judgment, and execution by writ of *fiery facias* was issued against his effects; and the question is, whether the landlord, who finds corn growing upon his re-entry, has a right to such corn?

In the first place, this is not the case of an estate, the termination of which was originally, uncertain. The estate of the lessee was certain at first, but liable to be defeated by a condition which he allowed to be inserted in the contract, and which was a lawful condition. It is sufficient that the condition is broken, to see that the landlord enters on his title paramount, and takes the property then as he had it originally. We might therefore decide this case on the distinction which exists between an estate, the determination of which depends on the breach of any condition entered into by the party, and an estate, the determination of which is rendered uncertain by operation of law. But it has been argued that the estate here was not determined by the act of the tenant, but immediately, at least, by act of law. The original act, however, on which the legal proceedings are founded, was the act of the tenant alone. Contracting the debt was his act; so, the refusal to pay, which brought on the suit and judgment; so, the omission to satisfy the judgment. The execution is the immediate and necessary consequence therefore of his own act. And it is not so clear that the entire breach of the condition should be the act of the tenant alone. On the contrary, there are cases in which the entire breach of the condition has not been complete by the single act of the party. As in *Bulwer v. Bulwer*, although the resignation was not complete till acceptance by the bishop, the title was forfeited by the clergyman's act of resignation. And the law is the same in cases where an estate is to be forfeited by surrender, although the surrender be not complete by the act of the tenant alone. There is no authority which decides that the act on which the lease is forfeited according to a condition, must be the sole and distinct act of the tenant alone. It has been urged that this construction will occasion great inconvenience to the tenant for the doubtful interval between his original act and the landlord's re-entry, inasmuch as it is not certain that such act will be followed by legal proceedings, or by the landlord's re-entry. There is no doubt that such inconvenience may exist, but it is an inconvenience occasioned by the act of the lessee himself; and the argument goes too far, because even in cases where the forfeiture accrued indisputedly from the sole act of the lessee in the breach of a condition, an interval must elapse before it can be known whether the landlord elects to enter; and yet it is clear that upon such breach of condition he is entitled to enter. The principal authority which has been relied on in support of the plaintiff's argument, is in *Oland's Case*, in the Fifth Reports, and Rolle's Abridgement. There it is laid down, that if a lease be made to husband and wife during coverture, and the husband sow the land, and afterwards they be divorced, *causa præcontractus*, the husband shall have the corn, because the judgment is the act of the law. But that was a case not of a condition, but of a limita-

tion creating an estate of uncertain duration ; for it was uncertain how long the relation of man and wife might continue ; and it turned out that in consequence of some act before the supposed marriage, the parties were not in effect husband and wife, so that the lease was granted under an error as to the supposed fact ; the just inference therefore is, that the estate was void by act of law. In the present case the landlord entered in consequence of the act of the lessee, and being in as of his former estate the damages must be reduced by the amount of the emblements, to which he was clearly entitled.

GASELEE, J. I am of the same opinion. There is great weight in the point relied on by the defendant's counsel, that the landlord's re-entry was the consequence of a stipulation between the parties ; but independently of that, there is sufficient to justify the application to reduce the damages. In the case put, of an estate during coverture, terminated by the dissolution of the supposed marriage, it was not the act of the party which dissolved the marriage, but the marriage itself was a nullity.

BOSANQUET, J. I am of opinion that the lessor in this case is entitled to retain the emblements. It is distinctly laid down that a lessor is entitled to the emblements where he enters for condition broken, because he enters by title paramount, and is in as of his first estate. Then, has the lessor entered here for condition broken ? It was stipulated between him and his tenant, that upon certain events he should re-enter and repossess the land as of his former estate, and having entered in consequence of one of those events he is entitled to emblements. But it has been urged that the condition here has not been broken, or has not been wholly broken by the tenant, because the stipulation between the parties for re-entry, requires that the act of the tenant shall be followed by an act of law, as the issuing of an execution or a commission of bankruptcy. It has also been contended that the completion of the forfeiture is the act of the lessor, and not the act of the tenant, because it depends on the lessor whether he will take advantage of the forfeiture or not. But that argument proves too much, for it would show that in no case would the lessor be entitled to emblements upon re-entry for a breach of condition ; and the argument that the execution which gives the immediate right of re-entry is an act of law, and not the act of the lessee, is answered by saying that it is the consequence of the act of the lessee. In *Fauntleroy's Case* an insurance company refused to pay the amount of an insurance on his life, on the ground, that when he was executed for forgery, his death was occasioned by his own act. For the plaintiff it was contended that he died by act of law ; but the House of Lords held that his death must be considered as occasioned by his own act. The case cited in *Oland's Case* does not apply, because there was no express condition broken, nor any stipulation for re-entry.

ALDERSON, J. I am of the same opinion. White, the lessee, incurred a forfeiture by his own act ; the lessor had stipulated, that if the lessee

contracted a debt which should be followed up by judgment and execution, or committed an act of bankruptcy followed up by a commission, the lessor should re-enter and have the land as of his former estate. It seems to me that the legal consequences only qualify the act of the lessee, because that act pervades all the subsequent proceedings; for the commission could not issue unless there had been an act of bankruptcy, nor the execution unless there had been a previous debt; and if the lessee stipulates that in such case he shall be turned out of possession, it is by his own act that he is turned out.

*Rule absolute.*¹

GRAVES v. WELD.

KING'S BENCH. 1833.

[*Reported 5 B. & Ad. 105.*]

TROVER for clover, the clover hay, and clover seed. Plea, not guilty. At the trial before *Taunton, J.*, at the Dorsetshire Summer Assizes, 1832, a verdict was found for the plaintiff, subject to the following case: —

The plaintiff being possessed of a close under a lease for ninety-nine years, determinable on three lives, in the course of the spring of 1830, sowed it with barley; and in May of the same year, he sowed broad clover seed with the barley. The last of the three lives expired on the 27th of July, 1830, the reversion then being in the defendant. In the autumn of 1830, the plaintiff took the crop of barley, in the mowing of which a little of the clover plant which had sprung up was cut off and taken together with the barley. In January, 1831, the plaintiff gave up the possession of the close to the defendant. According to the usual course of good husbandry, broad clover is sown about April or May, and the crop is fit to be taken for hay about the beginning of June in the following year. The clover in question was cut by the defendant about the end of May, 1831, which was more than a twelve-month after the seed had been sown. After the barley is cut, the clover is sometimes depastured by sheep in the autumn, whereby the crop is made thicker; if not so fed off, the shoots would be killed by the frost in the winter. In this case the clover was not depastured. Broad clover is sometimes sown by itself; but more frequently with barley, flax, oats, or wheat. The part of the clover plants cut off with

¹ "Between mortgagor and mortgagee, a mortgagor in possession is a tenant at will; and, if the emblements are not protected in his hands, it is because he may obtain their value in account, on bill to redeem. But he may lawfully lease, subject to the mortgage; and when the mortgagee defeats the estate, either by entry or judicial sale, the annual crops are saved for the tenants, under the common rule relating to emblements, because the termination of the lease is uncertain." *LANE, C. J.* in *Cassilly v. Rhodes*, 12 Ohio 88, 95. But see *Lane v. King*, 8 Wend. 584.

the barley at the time of mowing it, makes the barley straw better as fodder; but the clover is sown for hay, or seed, and not to improve the barley straw. When the clover grows up high, it is injurious to the barley. It is the common course of husbandry, to take for hay a second crop of the clover in the autumn of the year after it is sown; and a second crop was so taken by the defendant in the autumn of 1831. But when it is intended for seed, no crop is taken for hay in the summer. Sometimes the clover is left for a third year, but it is not then a good crop. The usual course of husbandry is to plough up the land in the autumn of the second year for wheat. There was no covenant in the lease as to the away going crop, or binding the tenant to any particular course of husbandry.

The learned judge took the opinion of the jury on the two following questions: First, whether the plaintiff received any benefit from taking the clover with the barley straw, sufficient to compensate him for the cost of the clover seed, and the extra expense of sowing and rolling. Secondly, whether a prudent and experienced farmer, knowing that his term was to expire at Michaelmas, would sow clover with his barley in the spring, where there was no covenant that he should do so; and, whether, in the long run, and on the average, he would repay himself in the autumn for the extra cost incurred in the spring. The jury answered both these questions in the negative.

The question for the opinion of the court was, whether the plaintiff was entitled to the clover cut in May, 1831, as emblements.

The case was argued in this term.

Follett, for the plaintiff.

Gambier, for the defendant.

DENMAN, C. J. In this case the plaintiff is undoubtedly entitled to emblements. The question is, whether that which is here called the second crop of clover falls under that description? We think it does not.

In the very able argument before us, both sides agreed as to the principle upon which the law which gives emblements was originally established. That principle was, that the tenant should be encouraged to cultivate, by being sure of receiving the fruits of his labor; but both sides were also agreed that the rule did not extend to give the tenant *all* the fruits of his labor, or the right might be extended in that case to things of a more permanent nature, as trees, or to more crops than one; for the cultivator very often looks for a compensation for his capital and labor in the produce of successive years. It was, therefore, admitted by each, that the tenant could be entitled to that species of product only which grows by the industry and manurance of man, and to one crop only of that product. But the plaintiff insisted that the tenant was entitled to the crop of any vegetable of that nature, whether produced annually or not, which was growing at the time of the cesser of the tenant's interest; the defendant contended that he was entitled to a crop of that species only which ordinarily repays the

labor by which it is produced, within the year in which that labor is bestowed, though the crop may, in extraordinary seasons, be delayed beyond that period. And the latter proposition we consider to be the law.

It is not, however, absolutely necessary to decide this question; for, assuming that the plaintiff's rule is the correct one, the crop which is claimed was not *the crop growing at the end of the term*. The last *cestui que vie* died in July; the barley and the clover were then growing together on the same land, and a crop of *both*, together, was taken by the plaintiff in the autumn of that year; though the crop of clover of itself was of little value. Thus the plaintiff has *had one crop*; and if it were necessary, either generally, or in the particular case, that the crop taken should remunerate the tenant, we must observe, that though the crop of clover alone did not repay the expense of sowing and preparation, the case does not find that both crops together did not repay the expenses incurred in raising both. The decision, therefore, might proceed on this short ground; but as the more general and important question has been most fully and elaborately argued, we think it right to say we are satisfied that the general rule laid down by the defendant's counsel is the right one.

The principal authorities upon which the law of emblements depends, are Littleton, § 68, and Coke's Commentary on that passage. The former is as follows: "If the lessee soweth the land, and the lessor, after it is sown and before the corn is ripe, put him out, yet the lessee shall have the corn, and shall have free entry, egress and regress to cut and carry away the corn, because he knew not at what time the lessor would enter upon him." Lord Coke, Co. Lit. 55 a, says, "The reason of this is, for that the estate of the lessee is uncertain, and, therefore, lest the ground should be unmanured, which should be hurtful to the Commonwealth, he shall reap the crop which he sowed in peace, albeit the lessor doth determine his will before it be ripe. And so it is if he set roots or sow hemp or flax, or any other *annual* profit, if after *the same be planted*, the lessor oust the lessee; or if the lessee dieth, yet he or his executors shall have *that year's crop*. But if he plant young fruit trees, or young oaks, ashes, elms, &c., or sow the ground with acorns, &c., there the lessor may put him out notwithstanding, because they will yield *no present annual profit*." These authorities are strongly in favor of the rule contended for by the defendant's counsel; they confine the right to things yielding present *annual* profit: and to that year's crop, which is growing when the interest determines. The case of hops, which grow from ancient roots, and which yet may be emblements, though at first sight an exception, really falls within this rule. In *Latham v. Atwood*, Cro. Car. 515, they were held to be "*like emblements*," because they were "such things as grow by the manurance and industry of the owner, by the making of hills and setting poles:" that labor and expense, without which they would not grow at all, seems to have been deemed equivalent to the sowing

and planting of other vegetables. Mr. Cruise, in his Digest, i. 110, ed. 3, says that this determination was probably on account of the great expense of cultivating the ancient roots. It may be observed, that the case decides that hops, so far as relates to their annual product only, are emblements; it by no means proves, that the person who *planted* the young hops would have been entitled to the first crop whenever produced.

On the other hand, no authority was cited to show that things which take more than a year to arrive at maturity, are capable of being emblements, except the case of *Kingsbury v. Collins*, 4 Bing. 202, in which teasles were held by the Court of Common Pleas to be so. But this point was not argued, and the court does not appear to have been made acquainted with the nature of that crop or its mode of cultivation, or it *may be*, that *in* the year when the plant is fit to gather, so much labor and expense is incurred, as to put it on the same footing as hops. We do not therefore consider this case as an authority upon the point in question.

The note of Serjeant Hill in 9 Vin. Abr. 368, in Lincoln's Inn Library, which Mr. Gambier quoted, is precisely in point in the present case, and proves that, in the opinion of that eminent lawyer, the crop of clover in question does not belong to the plaintiffs. It is stronger, because there the estate of the tenant is supposed to determine *after* harvest, whereas here it determined before.

The weight of authority, therefore, is in favor of the rule insisted upon by the defendant. There are besides some inconveniences, doubts, and disputes, which were pointed out in the argument, which would arise if the other rule were to prevail. Is the tenant to have the feeding in autumn, besides the crop in the following year? If so, he gets something *more* than one crop. Is he to have the possession of the land for the purpose? Or is the reversioner to have the feeding; and, in that case, is the reversioner to be liable to an action if he omits to feed off the clover, and thereby spoils the succeeding crop? These inconveniences do not arise if the defendant's rule is adopted. It also prevents the reversioner from being kept out of the full enjoyment of his land for a longer time than a year at the most; whereas, upon the other supposition, that period may be extended to two or more years, according to the nature of the crop.

We are therefore of opinion that the rule regulating emblements is that which the defendant has contended for, and that for this reason also he is entitled to our judgment. *Judgment for the defendant.*¹

¹ See *Reiff v. Reiff*, 64 Pa. 134; *Evans v. Iglehart*, 6 G. & J. 171, 188 *et seq.*; *Flanagan v. Seaver*, 9 Ir. Ch. 230; *Hendrickson v. Cardwell*, 9 Baxt. 389; *Sparrow v. Pond*, 49 Minn. 412.

On the Statute of Frauds as affecting the sale of growing timber and crops, see Williston, *Cases on Sales*, pp. 734-758.

COOPER v. WOOLFITT.

EXCHEQUER. 1857.

[Reported 2 H. & N. 122.]

THE declaration alleged that W. Cooper, in his lifetime and at the time of his death, was seised in fee of certain land called the "Clay pits," and being so seised sowed the same with a crop of corn and barley, which was growing thereon at the time of his death; and that at the time of the committing of the grievances hereinafter mentioned, the plaintiffs, as executors, were entitled to the said crop of corn and barley, which was then growing on the said land, and to a right of way, &c., for the purpose of cutting and carrying away the said crop of corn and barley; that the crop was ripe and ready to be cut; yet the defendant obstructed the said way, and prevented the plaintiffs from entering and carrying away the said corn, &c.

Plea. That W. Cooper, by his last will, devised the said land, called the "Clay pits," unto one M. Woolfitt, to hold the same to the use of M. Woolfitt, her heirs and assigns forever, whereby M. Woolfitt became seised of the said land called the "Clay pits," and entitled to the crop of corn and barley growing thereon; and that M. Woolfitt being so seised and so entitled to the said crop of corn and barley, the defendant, as the servant of M. Woolfitt, committed the supposed grievances.

Replication. That W. Cooper, by his will, gave and devised the said land to M. Woolfitt, chargeable, nevertheless, with the payment of a legacy of £20 thereafter bequeathed to Samuel Cooper, to hold the same, chargeable as aforesaid, unto and to the use of M. Woolfitt, her heirs and assigns forever. And, by his will, he gave and bequeathed to M. Woolfitt and Sarah Cooper, in equal shares, all his moneys, securities for money, household furniture, goods, chattels, personal estate and effects whatsoever and wheresoever *not thereinbefore specifically bequeathed*; and by a codicil to his said will, duly executed, &c., he revoked the said bequest, in favor of the said M. Woolfitt, of one half part of the residue of his personal estate and effects, and bequeathed such one half part to the plaintiff, Henry Cooper, and afterwards died without altering his said will and codicil as to the said bequest, and that the corn and barley in the declaration mentioned was not specifically bequeathed by the will or codicil, or otherwise.

The defendant demurred to the replication. He also rejoined: That W. Cooper, by his said will, bequeathed to the said Samuel Cooper, the legacy of £20, to be payable at the end of twelve calendar months next after his decease, by M. Woolfitt, out of the close of land called "Clay pits," &c. And he also bequeathed unto Joseph Cooper absolutely, all that his post windmill, with the sails, gear and appurte-

nances; and that the said W. Cooper, by his said will, gave and bequeathed unto M. Woolfitt and the plaintiff, Sarah Cooper, in equal shares, all his moneys, securities for money, household furniture, goods, chattels, personal estate and effects whatsoever and wheresoever not thereinbefore specifically bequeathed, subject to the payment of all his just debts, his funeral and testamentary expenses, as well as to the payment of legacies of £20 apiece unto James Cooper and E. Cooper, and he appointed them, the said M. Woolfitt and Sarah Cooper, joint executrixes of his said will; and that the said W. Cooper, by his said codicil, charged his aforesaid mill and appurtenances bequeathed to the said Joseph Cooper with the payment of the said two legacies of £20 apiece to the said James Cooper and E. Cooper, in exoneration of his residuary personal estate, and he appointed the plaintiff, Henry Cooper, joint executor with the said Sarah Cooper of his will.

The plaintiff demurred to the rejoinder.

Bittleston, for the defendant.

Joseph Brown, for the plaintiff.

POLLOCK, C. B. The question is, whether, under the large words employed by the testator in the bequest of personalty, the growing crops are so clearly given to the legatee as to take them out of the operation of the rule of law which, in case of a devise of the ground on which the crops stand, gives them to the devisee. A devisee takes more than the heir would have done; for he is not *hæres factus*, but takes by conveyance. He is therefore entitled to everything which is appurtenant to the land, and as such to all crops growing on the land at the time of the testator's decease, unless it appears with certainty that the testator intended some one else to take them.¹ Here it is impossible to say that it is clear that the testator intended to give these crops to the executors. I am therefore of opinion that there must be judgment for the defendant.

MARTIN, B. I am of the same opinion. The replication shows that the testator having given to M. Woolfitt the close called "the Clay pits," bequeathed to H. Cooper and S. Cooper all his personal estate whatsoever and wheresoever not thereinbefore specifically bequeathed. It is said that this applies to the crops growing on the land in question. But according to the well-established rule, they go to the devisee of the land unless expressly given by the will to some one else.

BRAMWELL, B. I am of the same opinion. It is said that the general bequest of the personal estate, not thereinbefore specifically bequeathed, shows that the emblements were not to go to the devisee of the land. But, in fact, this amounts to nothing, because in every

¹ "It is not easy to account for this distinction, which gives corn growing to the devisee, but denies it to the heir; though it has been attempted. See Gilb. Laws of Evid. 250." Co. Lit. 55 b, Hargrave's note. In New York the position of the devisee as to annual crops is affected by statute; *Stall v. Wilbur*, 77 N. Y. 158; but not as to growing grass; *Matter of Chamberlain*, 140 N. Y. 390. See also *Humphrey v. Merritt*, 51 Ind. 197.

case where an executor is appointed all the personal effects vest in him.

CHANNELL, B. I am of opinion that the defendant is entitled to judgment upon each of the demurrers. The law is thus stated in Sheppard's Touchstone, by Preston, p. 472: "As between an executor and devisee the emblements belong to the devisee, unless they are expressly bequeathed." Here there is nothing either in the will or the codicil to cut down the effect of the devise to M. Woolfitt.

Judgment for the defendant.

TERHUNE v. ELBERSON.

SUPREME COURT OF JUDICATURE OF NEW JERSEY. 1810.

[Reported 2 Penning. 533.]

THE action below was an action of trespass, for cutting down and taking away eighty bushels of rye, and twenty bushels of wheat of the plaintiff below, Elbersen, by the defendant below, Terhune, the 7th July, 1810.

The defence set up, was, that the defendant below purchased the land on which he cut the wheat and rye of the plaintiff below, the 4th May, 1810, and had gone into possession of the premises under the said deed, on which the wheat and rye was cut at the time of cutting it, which fact appeared by the record.

It was contended by the plaintiff below, that although he did sell the land on which the wheat and rye was cut, to the defendant, in May, and gave him possession thereof, yet that this sale did not convey the wheat and rye growing on the land. That whoever sowed in peace should reap in peace. The cause was tried by a jury, and verdict and judgment for the plaintiff for \$30, with costs.

BY THE COURT. The doctrine of emblements does not apply to this case. The sale and conveyance of the land in fee simple, carried with it the wheat and rye growing on the land, unless the wheat and rye was specially reserved, which was not pretended.

Let the judgment be reversed.

HOOSER v. HAYS.

COURT OF APPEALS OF KENTUCKY. 1849.

[Reported 10 B. Mon. 72.]

JUDGE GRAHAM delivered the opinion of the Court.

This is an action of replevin by Hooser to recover possession of one hundred bushels of wheat, in the sheaves, averred to have been wrongfully taken and detained by Hays. On the trial, the defendant filed four pleas. Upon the first plea, not guilty, issue was taken; but to pleas numbered 2, 3, 4, the plaintiff demurred, and the Court having sustained the pleas, and the plaintiff failing to make further replication, judgment was rendered for the defendant, on the verdict of a jury, sworn to inquire of damages. The sufficiency of these pleas to bar the plaintiff's action, is now to be determined.

It is only necessary to notice plea No. 3, which avers that the defendant was and is seized in his demesne, as of fee, of and to the use, trusts, and profits, of a certain close, (describing it,) and being so seized, the plaintiff with force and arms broke and entered into the said close, and ousted and dispossessed the defendant out of and from his said close, and tortiously took possession thereof, and sowed the same with and in wheat; and whilst the same wheat was growing on the said close of defendant, of which he was and is so seized, as aforesaid, and before the said wheat was cut and severed from the said close, defendant re-entered into the said close, as lawfully he might and had a right to do, and was thereby in of his former right and title, and of his old estate in the said close; and being so in, and upon the said close, he cut and severed the said wheat, so sown by plaintiff and growing thereon, as lawfully he might, which said wheat so sown by plaintiff and growing on the said close of defendant, and cut and severed from the said close, by defendant, is the same wheat in plaintiff's writ and declaration mentioned, &c.

This plea avers title in fee in the defendant, possession and use by him, that the plaintiff tortiously entered and forcibly dispossessed him, sowed the ground with wheat, and afterwards the defendant re-entered. It is said: "If a disseizor sow the ground and sever the corn, and the disseizee re-enter, he shall have the corn, because he entereth in by a former title, and severance or removing of the corn altereth not the case, for the regress is a continuation of the freehold in him, in judgment of law, from the beginning. 1 Coke Inst. sec. 68, 55 b.

The plea presents a state of facts, which, if true, (as they are on demurrer taken to be,) shows that the defendant was the owner in fee of the land on which the wheat grew, and that after disseizin he had re-entered, and was in the actual and lawful possession of the land and of the wheat, as his own property, and was entitled to the possession thereof. If these things are so, then the plaintiff had not right to the

immediate possession of the wheat, and could not maintain the writ of replevin. 3 Stat. Law, 503; 4 J. J. Mar. 255; 10 S. & R. 114.

The third plea seems to be a good bar to plaintiff's action. The demurrer to it was properly overruled, and the plaintiff having abided by his demurrer, the Court did not err in giving judgment for defendant.

The judgment of the Circuit Court is therefore affirmed.

Grey and Stites for appellant.

B. & A. Monroe and *J. & W. L. Harlan* for appellee.¹

SMITH v. PRICE.

SUPREME COURT OF ILLINOIS. 1865.

[Reported 39 Ill. 28.]

WRIT of error to the Circuit Court of Marion county; the Hon. *Silas L. Bryan*, judge, presiding.

The case is stated in the opinion of the court.

Messrs. Willard and Goodnow, for the plaintiff in error.

Mr. H. K. S. O'Melveny, for the defendant in error.

MR. JUSTICE LAWRENCE delivered the opinion of the court. This was a bill in chancery filed by Smith, plaintiff in error, to enjoin Price, the defendant in error, from removing certain fruit-trees growing in a nursery, and certain ornamental shrubbery, from a tract of land sold by the latter to the former. Price answered (the oath to his answer having been waived), and on the coming in of the answer a motion was made to dissolve the injunction. A replication was filed and the case seems to have been irregularly set down for final hearing at the same time with hearing the motion to dissolve, and to have been finally disposed of upon the pleadings, and the affidavits filed for and against the

¹ "It is undoubtedly true, that, at common law, a person who had been ousted from land might, after a recovery and re-entry, maintain his action of trespass for the mesne profits and for waste, for the reason that after re-entry the law supposes he has always been seised and the acts of the defendant were a continuous trespass upon the rightful possession of the plaintiff; but no case has been cited in which this principle has been held to make the owner of the land out of possession, under such circumstances, the owner of the crops grown and actually harvested by the defendant. The very fact that he may recover the rents and profits of the land, shows that he cannot recover the crops; for, as was well said in the case of *Stockwell v. Phelps*, 34 N. Y. 363, the owner of the land, in such cases, does not recover the value of the crops raised and harvested, but the value of the use and occupation of the land; and the annual crops of grain and grass, which contain both the value of the use of the land and the labor of the farmer, do not, under such circumstances, belong to the owner of the land. It would be an oppressive rule to require every one who, after years of litigation perhaps, may be found to have a bad title, to pay the gross value of all the crops he has raised; and it would be an inconvenience to the public if the bad title of the farmer to his land attached to the crops he offered for sale, and rendered it necessary to have an abstract of his title to make it safe to purchase his produce." *TEMPLE, J.*, in *Page v. Fowler*, 39 Cal. 412, 416.

motion. As no exception was taken to this proceeding, it was probably had by consent. The court rendered a decree making the injunction perpetual as to a part of the trees, and dissolving it as to a part; and from this decree the complainant prosecutes a writ of error.

The defendant admits a sale of the land by himself to the complainant, and that the latter went into possession under the contract of purchase, but insists that one of the terms of the sale was a verbal reservation of the nursery trees and some other ornamental shrubbery. The proof made in the affidavits upon this point is uncertain and contradictory.

While fruit-trees and ornamental shrubbery grown upon premises leased for nursery purposes would probably be held to be personal property, as between the landlord and tenant, yet there is neither authority nor reason for saying that, as between vendor and vendee, such trees and shrubbery would not pass with a sale of the land. They are annexed to, and a part of the freehold. As between vendor and vendee, even annual crops pass with the land where possession is given. *Bull v. Griswold*, 19 Ill. 631. Under the contract of sale and the delivery of possession by Price to Smith, the latter became the owner of the trees as well as of the soil, and it would be a violation of the most familiar rules of evidence to receive proof of a verbal arrangement contemporaneous with the written contract and impairing its legal effect. The parties, in executing the written instrument, deliberately made it the exclusive evidence of the terms of their agreement. This instrument shows a sale of the land in such terms as to pass the trees. No reservation is made, and to permit the vendor now to show that there was a verbal agreement for their reservation, would be to permit him to prove a verbal contract, inconsistent with the legal import of that executed by the parties under their hands and seals. This the law forbids. We find nothing in the case to make it an exception to this familiar principle, and it is therefore unnecessary to advert to the evidence in detail. As the record shows that Price had actually removed a part of the shrubbery, and claimed the right to move much more, it was a proper case for an injunction, and the decree will be reversed and the cause remanded, with instructions to the court to proceed in conformity with this opinion. *Decree reversed.*¹

BRACKETT v. GODDARD.

SUPREME JUDICIAL COURT OF MAINE. 1866.

[Reported 54 Me. 309.]

ASSUMPSIT on account annexed, for \$60, for money paid by the plaintiff to the defendant, for logs and down timber, the title to which,

¹ See *Noble v. Bosworth*, 19 Pick. 314, *post*; *Strong v. Doyle*, 110 Mass. 92.

the plaintiff alleged, was not in the defendant at the time of sale. The writ also contained a count for money had and received for same amount.

It appeared from the report that the defendant owned, in the summer of 1863, a timber lot in Hermon; that he cut down a large number of hemlock trees thereon, peeled the bark therefrom and removed it from the lot, — intending to prepare the trees by cutting off the tops and haul them off as logs to be sawed during the ensuing winter. The trees were severed from the stumps, and they lay as they fell, with the tops on. In the felling the choppers endeavored, so far as practicable, to have them lie in a good position for peeling and afterwards hauling them off.

In the fore part of the fall of the same year, the defendant conveyed the lot by deed of warranty, without any reservations, to one Works. On the 20th of the following November, after Works had entered into possession of the lot under his deed, the defendant sold the hemlocks thus cut, to the plaintiff, by a bill of sale. To recover back the money paid for the bill of sale, this action was brought.

Previous to the commencement of this suit, the plaintiff demanded the hemlocks of Works, who refused to deliver them or permit the plaintiff to take them. Thereupon the plaintiff sued Works in trover therefor, and entered his action in court, which action was continued from term to term for several terms, when that action was by agreement of parties entered “neither party.” At a certain term of the court, during the pendency of that action, the plaintiff wrote to the defendant, then residing at Manchester, N. H., asking him to come to Bangor as a witness. The defendant went to Bangor at the time requested. For his travel and attendance as a witness, he filed an account in set-off in this action.

The court were to render such judgment as the legal rights of the parties entitled them to.

D. D. Stewart, for the plaintiff.

A. W. Paine, for the defendant.

APPLETON, C. J. This is an action brought to recover the price of certain logs sold by the defendant to the plaintiff. The claim is based upon an alleged failure of the defendant's title.

The defendant, while owning a lot of land in Hermon, cut down a quantity of hemlock trees thereon. After peeling the bark therefrom and hauling it off the land, he conveyed the lot to one Works, by deed of warranty, without any reservation whatever. At the date of this deed, the hemlock trees in controversy were lying on the lot where they had been cut, with the tops remaining thereon.

The defendant, after his deed of the land to Works, conveyed the hemlocks cut by him to the plaintiff. Works, the grantee of the defendant, claimed the same by virtue of his deed. The question presented is whether the title to the logs is in the plaintiff or in Works.

Manure made upon a farm is personal property, and may be seized

and sold on execution. *Staples v. Emery*, 7 Greenl. 201. So, wheat or corn growing is a chattel, and may be sold on execution. *Whipple v. Tool*, 2 Johns. 419. Yet it is held that growing crops and manure, lying upon the land, pass to the vendee of the land, if not excepted in the deed (2 Kent, 346), or by Statute, as in this State by R. S. c. 81, § 6, clause 6. Fencing materials on a farm, which have been used as a part of the fences, but are temporarily detached, without any intent of diverting them from their use, as such, are a part of the freehold, and pass by a conveyance of the farm to a purchaser. *Goodrich v. Jones*, 2 Hill, 142. Hop-poles, used necessarily in cultivating hops, which were taken down for the purpose of gathering the crop and piled in the yard, with the intention of being replaced in the season of hop-raising, are part of the real estate. *Bishop v. Bishop*, 1 Kenan, 123.

Timber trees, if blown down, or severed by a stranger, pass by a deed of the land. "We think that it cannot admit of a doubt," remarks Richardson, C. J., in *Kittredge v. Wood*, 3 N. H. 503, "that trees felled and left upon the land, fruit upon trees, or fallen and left under the trees where it grew, and stones lying upon the earth, go with the land, if there be no reservation." The hemlock trees were lying upon the ground. The tops and branches were remaining upon them. They were not excepted from the defendant's deed, and, being in an unmanufactured state, they must, from analogy to the instances already cited, pass with the land. Such, too, is the Statute of 1867, c. 88, defining the ownership of down timber. It would have been otherwise, had they been cut into logs or hewed into timber. *Cook v. Whitney*, 16 Ill. 481.

The defendant, at the plaintiff's request, travelled from another State, as a witness, to testify for him in his suit against Works. He claims to have his fees allowed in set-off in this suit. His account in set-off was regularly filed. He is entitled to compensation therefor, which, as claimed, will be travel from his then place of residence, and attendance, in accordance with the fees established by Statute.

CUTTING, KENT, WALTON, DICKERSON, and BARROWS, JJ., concurred. TAPLEY, J., did not concur.

*Offset allowed. — Defendant defaulted, to be heard in damages.*¹

¹ See *Noble v. Sylvester*, 42 Vt. 146, ante, p. 530. So a matured crop unsevered. *Tripp v. Hasceig*, 20 Mich. 254. But see *Hecht v. Dettman*, 56 Iowa, 679.

LEWIS v. McNATT.

SUPREME COURT OF NORTH CAROLINA. 1871.

[Reported 65 N. C. 63.]

THIS was an action of trespass *vi et armis*, commenced in the year 1860, and tried before his Honor, Judge *Russell*, at the Spring Term, 1870, of the Superior Court of Bladen county, upon the issue joined on the plea of not guilty.

The plaintiff declared for the loss of certain turpentine, some in barrels and some on the trees, and for an injury to his slaves, caused by the defendant in going upon a tract of land which the plaintiff held under a lease, and driving off his slaves and seizing the turpentine. The testimony disclosed the fact that the plaintiff was engaged in making turpentine with another person, and that they were partners, that the turpentine which had been lost was the property of the partnership, and that the slaves alleged to have been injured were the property of the plaintiff alone, and the injury to them was his individual loss, and not that of the partnership. The defendant contended that the plaintiff could not recover because of the non-joinder, but the court held that the defendant could not take advantage of the non-joinder under the general issue, and that the plaintiff could recover his proportional share of the loss, and to this ruling the defendant excepted.

The defendant also contended that the plaintiff could not recover both for the injury to his slaves, and for the damage sustained as a partner for the loss of the turpentine, but the court held otherwise, and the defendant again excepted.

There was evidence that a large part of the turpentine consisted of what is called "scrape," being that portion which does not run into the box but remains on the face of the tree, and which is removed after it has formed in sufficient quantity, by scraping it from the tree. It was proved that the lease under which the plaintiff held, had expired before the trespass was committed, and the defendant contended that the plaintiff could not recover for the scrape turpentine remaining on the trees.

His Honor charged the jury that if the plaintiff had cultivated the trees and manufactured the scrape it was his property, and was not a part of the tree going with the realty, and that the plaintiff had a right to remove it, although his lease might have expired, and if the defendant drove away his slaves and prevented them from removing it the plaintiff could recover for the loss of it.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

W. McL. McKay, for the defendants.

Bragg and Strong, for the plaintiff.

DICK, J. Crude turpentine which has formed on the body of the tree, and is usually known as "scrape," is personal property, and belongs to the person who has lawfully produced it by cultivation. *State v. Moore*, 11 Ire. 70. It is an annual product of labor and industry, and although it adheres to the body of the tree it is not a part of the realty. The turpentine crop may be properly classed with *fructus industriales*, for it is not the spontaneous product of the trees, but requires annual labor and cultivation. Upon a similar principle, hops which spring from old roots have long been regarded as emblements.

A lessee of turpentine trees, even after the expiration of his lease, has the right of "entry, egress and regress" to remove the "away-going crops" which he has produced by his labor, provided he does so within reasonable time. He has a right to the occupation of the premises for that purpose, and if this right is refused by the owner of the land, the lessee is entitled to recover the value of the property detained. *Brittain v. McKay*, 1 Ire. 265.

The "scrape" must be removed before the sap begins to flow in the subsequent spring, for then the new turpentine mingles with the old "scrape," which cannot be taken away without interfering with the rights of the owner of the trees.

In this case, it appeared, that the lease of the plaintiff had terminated, but there was no evidence as to the time when he entered for the purpose of removing the "scrape."

The charge of his Honor was, therefore, too general in its terms, as the plaintiff had no right of entry after the new turpentine had begun to flow, and for this error there must be a *venire de novo*.

The question of pleading raised on the trial by the defendant's counsel is attended with some difficulty on account of the change in our system of procedure. At common law in actions in form *ex delicto*, and which are not for the breach of a contract, if a party who ought to join, be omitted, the objection can only be taken by a plea in abatement, or by way of apportionment of damages on the trial; and the defendant cannot, as in actions in form *ex contractu*, give in evidence the non-joinder as a ground of nonsuit on the plea of the general issue. 1 Chitty, P. 76.

Under the C. C. P. § 8, par. 1, all civil actions pending in the courts when the present Constitution was approved by Congress, and which were not founded on contract, are to be governed by the C. C. P., "as far as may be according to the state of the progress of the action, and having regard to its subject, and not to its form." A different provision is made as to actions founded upon contracts made previous to the C. C. P. *Merwin v. Ballard*, at this term.

The C. C. P. § 62, provides that the parties who are united in interest must be joined as plaintiffs or defendants, &c. If a necessary party to an action be omitted, and the defect appears upon the face of the complaint, the non-joinder must be taken advantage of by demurrer. C. C. P. § 95. If it does not appear upon the face of the

complaint, the objection may be taken by answer. C. C. P. § 98. "If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same." C. C. P. § 99. It does not appear from the transcript at what term of the court the issues were joined in this case, and the defendant might have put in a plea in abatement at any time before pleading in bar of the action. If the issues were not joined when the case was transferred to the Superior Court, he would have been entitled to have objected to the non-joinder of a necessary party by answer, as the defect does not appear in the pleadings. As the defendant went to trial without taking any such objection, the charge of his Honor must be sustained.

Venire de novo awarded. Let this be certified.¹

¹ In many States, a landlord has a lien for rent on crops grown during the term. Stimson, Am. Stat. Law, § 2034.

On ice, see Gould on Waters, § 191.

CHAPTER VI.

MANURE.

LASSELL v. REED.

SUPREME JUDICIAL COURT OF MAINE. 1829.

[Reported 6 Greenl. 222.]

THIS case, which was trespass *quare clausum fregit*, came before the court upon a case stated by the parties.

The defendant had been the lessee of the plaintiff's farm, for the term of one year, ending April 15th; on which day he left the premises, leaving thereon a quantity of manure, lying in heaps about the barn and in the farmyard, so frozen that it could not then be removed without great inconvenience. It was afterwards taken away by the defendant, between the 10th and the 30th of May, as soon as it conveniently could be removed; doing no other damage than was unavoidable in effecting that object; and this act was the trespass complained of. Some of the cattle kept on the farm belonged to the lessor and were leased with the premises; others belonged to the defendant. Some of the hay also, was purchased by the defendant, and the residue was cut on the farm. The lease was referred to in the statement of facts, as containing covenants for the breach of which the lessor had recovered judgment; but none of them related to the surrender or mode of management of the farm, or in any manner touched the cause of this action.

The parties agreed that if the opinion of the court should be wholly with the defendant, he should have judgment for costs; that if he had a right to take away the manure at the end of his term, and not afterwards, the plaintiff should have judgment for nominal damages and costs; but if he had no right to the manure, the plaintiff should have judgment for its value, being fifteen dollars, and costs.

Johnson, for the defendant.

Crosby, for the plaintiff.

MELLEN, C. J. Upon examination of the lease referred to in the statement of facts, we do not perceive any covenants on the part of Reed which have any direct bearing on the questions submitted for our decision. Nothing is said as to the management of the farm in a husband-like manner, or surrendering it at the end of the year in as good order and condition as it was at the commencement of the lease. The lease is also silent on the subject of manure. The same kind of silence or inattention has been the occasion of the numerous decisions which are

to be found in the books of reports between lessors and lessees, mortgagors and mortgagees, and grantors and grantees, or those claiming under them, in relation to the legal character and ownership of certain articles or species of property, connected with or appertaining to the main subject of the conveyance or contract. A few words, inserted in such instruments, expressive of the meaning of the parties respecting the subject, would have prevented all controversy and doubt. In the absence of all such language, indicating their intention as to the particulars above alluded to, courts of law have been obliged to settle the rights of contending claimants, in some cases according to common understanding and usage; thus window blinds, keys, &c., are considered as part of the real estate (though not strictly speaking fixtures), or rather as so connected with the realty as always to pass with it. In other cases, as between landlord and tenant, the question has been settled upon the principles of general policy and utility; as in the case of erections for the purpose of carrying on trade, or the more profitable management of a farm by the tenant. It does not appear by the facts before us, that there is any general usage, in virtue of which the manure made on a farm by the cattle of the lessee during the term of his lease is considered as belonging to him exclusively, or to the lessor, or to both of them; and we have not been able to find any case directly applicable to the present. There being no usage, nor such decision, nor expressed intention of the parties to guide us, the case is one which must be decided on the principles of policy and the public good; for we do not deem the case cited from *Espinasse* as applicable. The opinion there given was founded on certain expressions in the lease, by means of which the lessee was considered as a trespasser in removing the manure from the farm at the end of the lease.

What then does policy and the public good dictate and require in the present case? Before answering the question we would observe that we do not consider the case in any way changed by the fact that a part of the fodder was carried on to the farm by the defendant, and a part of the cattle on the farm were those leased; for the purposes of the lease, such fodder and such cattle must be considered as belonging to the tenant during the term; and he must be considered as the purchaser of the fodder growing on the land, by the contract of lease, as much as if he should purchase it elsewhere on account of the want of a sufficiency produced by the farm; because a farm not yielding a sufficiency would command the less rent on that account. Numerous cases show that a tenant, at the termination of his lease, may remove erections made at his own expense for the purpose of carrying on his trade; because it is for the public good that such species of enterprise and industry should be encouraged; and where the parties are silent on the subject in the lease, the law decides what principle best advances the public interest and accords with good policy, and by that principle settles the question of property. It is our duty to regard and protect the interests of agriculture as well as trade. It is obviously true, as a general observation,

that manure is essential on a farm; and that such manure is the product of the stock kept on such farm and relied upon as annually to be appropriated to enrich the farm and render it productive. If at the end of the year, or of the term where the lease is for more than a year, the tenant may lawfully remove the manure which has been accumulated, the consequence will be the impoverishment of the farm for the ensuing year; or such a consequence must be prevented at an unexpected expense, occasioned by the conduct of the lessee; or else the farm, destitute of manure, must necessarily be leased at a reduced rent or unprofitably occupied by the owner. Either alternative is an unreasonable one; and all the above-mentioned consequences may be avoided by denying to the lessee what is contended for in this action. His claim has no foundation in justice or reason, and such a claim the laws of the land cannot sanction. It is true that the defendant did not remove and carry away any manure, except what was lying in heaps, probably adjoining the barn in the usual places; but still if he had a right to remove those heaps, why had he not a right to travel over the farm and collect and remove as much as he could find scattered upon the ground during the summer and autumn by the cattle in their pastures? In both instances the manure was the product of his cattle; yet who ever claimed to exercise such a right, or pretended to have such a claim? The argument proves too much, and leads to impossibilities in practice, as well as to something in theory which bears a strong resemblance to an absurdity.

We do not mean to be understood by this opinion, as extending the principles on which it is founded to the case of tenants of livery stables in towns, and perhaps some other estate, having no connection with the pursuits of agriculture; other principles may be applicable in such circumstances; but as to their application or their extent we mean to give no opinion on this occasion.

The case most nearly resembling the present is that of *Kittredge v. Woods*, 3 N. Hamp. Rep. 503, in which it was decided that when land is sold and conveyed, manure lying about a barn upon the land, will pass to the grantee, as an incident to the land, unless there be a reservation of it in the deed. The Chief Justice observed that the question would generally arise between lessor and lessee, and very plainly intimates an opinion that a lessee, after the expiration of his lease, would have no right to the manure left on the land. On the whole, we are all of opinion that the defence is not sustained, and that the defendant must be called. According to the agreement of the parties, judgment must be entered for \$15.00 and costs.¹

¹ See *Lewis v. Jones*, 17 Pa. 262; *Hill v. De Richemont*, 48 N. H. 87; *Daniels v. Pond*, 21 Pick. 387; *Middlebrook v. Corwin*, 15 Wend. 169.

Dung in common parlance is understood of dung in a heap, which was agreed to be a chattel, of which felony may be committed, and goeth to the executors; but if it lieth scattered upon the ground, so that it cannot well be gathered without gathering part of the soil with it, then it is parcel of the freehold.

STAPLES v. EMERY.

SUPREME JUDICIAL COURT OF MAINE. 1831.

[Reported 7 Greenl. 201.]

THIS was an action of trespass for taking and carrying away from the barn yard of the plaintiff, thirty cords of manure, in the month of May, 1828.

In a case stated by the parties, it was agreed that one Elwell, who was the owner of the farm from which the manure was taken, had mortgaged it to the plaintiff, who had entered for condition broken, in August, 1827. The farm, however, had for many years, and until September, 1830, been in the sole occupancy of Elwell the mortgagor; and the manure was taken under an execution against Elwell, committed to the defendant, as a constable, for collection.

J. and E. Shepley, for the plaintiff.

J. Holmes, for the defendant.

MELLEN, C. J. The only question decided in *Lassell v. Reed*, 6 Greenl. 222, was, that a tenant for one year, ending April 15, had no right to remove and convert to his own use, at or after the end of the lease, the manure made and accumulated on the premises during the continuance of the lease. In some peculiar respects the present action differs from that; for in this it appears that before the manure in question was made, the plaintiff had entered under the mortgage for breach of the condition; but it also appears that Elwell, the mortgagor, for many years before such entry, had been in possession of the land, and ever since the entry, which was in August, 1827, had continued in possession, up to the time when the statement of facts was signed in September, 1830; and from this last fact we are to consider Elwell, during all that time, as a disseisor of Staples, or as a tenant at will under him; but as a wrong is not to be presumed, and as none is alleged on his part, we ought to consider him, and so the plaintiff's counsel contends, as a tenant at will, liable to the uncertainties of such a tenancy, and entitled to its privileges; liable to have the lease terminated at the pleasure of the lessor or owner, but entitled to emblements, if terminated unreasonably, according to well-settled principles. It is important to attend to the reasoning of the court, which led to the decision, in the case of *Lassell v. Reed*. They say, "it is obviously true, as a general observation, that manure is essential on a farm; and that such manure is the product of the stock kept on such farm, and relied upon as annually to be applied to enrich the farm and render it productive. If at the end of the year, or of the term, when the lease is for more than a year, the tenant may lawfully remove the manure which has been accumulated, the consequence will be the impoverishment of the farm for the ensuing year; or such a consequence must be prevented at an unexpected expense, occasioned

by the conduct of the tenant; or else the farm, destitute of manure, must be leased at a reduced rent or unprofitably occupied by the owner." In the case before us the above reasoning is inapplicable, because none of the contemplated consequences could follow. Suppose a tenant for five years should, the second, third, and fourth years, sell all the manure and manage the land without any; whose loss would it be? He would be injuring himself, destroying his own profits to a certain extent, and rendering himself less able to pay his rent. Still, would he not have a right to proceed in this manner? At least might he not convert it to his own use in this imprudent manner without being a trespasser, or the purchaser's being liable in an action of trespass or trover? And has the owner any other remedy than an action for damages for bad husbandry and mismanagement of the farm? In the case supposed, the manure is a part of the annual produce of the farm; and, as such, belongs to the tenant; and might be attached and sold on execution to satisfy the debts of such tenant, without rendering the officer or the creditor a trespasser. That is to say, a tenant, as in the case supposed, may injure himself and impair his own profits; but the manure of the season next before the known term of the lease, is the produce of that season and designed for the use of the farm the following season, at which time the owner is to occupy or have the control of the land as in the above-mentioned reported case. Now, all the observations made on this head apply to the lease at will in the case under consideration. Elwell was in possession, as tenant at will, in August, 1827. The manure was made during the following winter, and the tenancy at will has never been determined; of course, the rights of no one have been impaired, but Elwell's; or rather the loss of profits by reason of the seizure and sale of the manure has been only his loss; the same having been a part of the annual profits designed for his own use and benefit, and which would have been so applied had not the sale prevented it. The hay and fodder cut on the land by Elwell in the summer of 1827, belonged to him as tenant, and that hay and that fodder were the materials of which the manure was composed, which is the subject of dispute, and which, had it not been taken and sold, would have increased his crops in 1828; and a similar alternation of profits and manure to increase them, probably occurred annually for two years, at least, afterwards; for the facts before us do not show any interruption of the natural order observed in such business on a farm. On this view of the cause we think the plaintiff is not entitled to maintain this action. As we have before observed, this case differs from *Lassell v. Reed*, and we do not mean to extend the principle of that decision beyond the peculiar facts, or to intimate any opinion as to the question whether manure, lying in heaps or yards, passes to the grantee by an absolute deed of land, where no mention is made of it as a subject of the conveyance. A nonsuit must be entered.¹

¹ But see *Perry v. Carr*, 44 N. H. 118.

NEEDHAM v. ALLISON.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE. 1852.

[Reported 24 N. H. 355.]

TROVER, for forty-five loads of manure, April 1, 1848.

It appeared that on the 13th of September, 1847, the defendant conveyed to the plaintiff his farm in Dublin, in this county, which the defendant then occupied. By a clause in the deed he reserved the possession until the first of April, 1848, and agreed at that time to give the plaintiff the possession.

At the date of the conveyance there was some manure about the barns and yards, all of which was carried out in the fall and spread upon the land for the use of the plaintiff.

At that time there was in the barn, hay and other fodder belonging to the defendant, and a portion of it was fed out to his cattle in the course of the ensuing winter season, and the manure was thrown out of the windows, and a portion of it lay about them and another part about the barn-yards. Prior to April 1, 1848, the defendant sold all the manure made from his stock kept by him on said farm, and from his said hay and fodder, and the same was in part drawn away from said farm by the purchaser, and the residue was sold by the purchaser to the plaintiff, and by him used on the farm.

A verdict was taken, by consent, for the plaintiff, for the value of the manure made from said hay and stock after said conveyance, and before the first of April, 1848, on which judgment is to be entered, or the verdict set aside, as the court shall adjudge.

Chamberlain, for the plaintiff.

Wheeler, for the defendant.

BELL, J., delivered the opinion of the court. It is settled here that manure, as between the buyer and seller, passes with the land, whether it is drawn out upon the land for the purpose of use there, or is lying in heaps, or otherwise, about the barns or yards; *Kittredge v. Woods*, 3 N. H. Rep. 503. The same is regarded as the law elsewhere in this country. *Stone v. Proctor*, 2 D. Chip. 115; *Wetherbee v. Ellison*, 19 Vt. (4 Wash.) 379; *Lassell v. Reed*, 6 Greenl. 222; *Middlebrook v. Corwin*, 15 Wend. 169; *Goodrich v. Jones*, 2 Hill, 142; *Daniels v. Pond*, 21 Pick. 371.

That principle, however, does not reach this case, since there is here no question except in relation to the manure made upon the premises subsequently to the sale, and while the defendant may be regarded as a tenant of the purchaser.

In England, in the case of manure made by a tenant of merely agricultural property, in the ordinary course of husbandry, Chancellor Kent seems to be of the opinion that the custom is for the outgoing

tenant to sell or take away the manure. 2 Com. 347, n. a. He cites *Roberts v. Barker*, 1 C. & M. 809; and the cases of *Higgon v. Mortimer*, 6 C. & P. 616; *Hutton v. Warren*, 1 M. & W. 466; 2 Gale, 71; *Beatty v. Gibbons*, 16 East, 116, support that view, while the cases of *Brown v. Crump*, 1 Marsh. 567; *Putney v. Sheldon*, 5 Ves. 147, 260, n., and *Onslow v. —*, 16 Ves. 173, seem to countenance a different rule, where there is no special contract or custom of the country.

In this country, in some of the States it has been held that the manure made by the tenant during his term, is his property, which he has the right to remove or sell, and which may be attached and holden as his property for the payment of his debts. *Staples v. Emery*, 7 Greenl. 201; *Southwick v. Ellison*, 2 Iredell, 326.

In others, it is held that in the absence of special agreement, or a special custom, the rules of good husbandry require that the manure made upon a farm, in the ordinary course, should be expended upon it; that such manure is an incident of the freehold, and belongs to the landlord, subject to the right of the tenant to use it in the cultivation of the land; and that the tenant has no right to remove or dispose of it, or to apply it to any other use, either during or after the expiration of his tenancy. *Wetherbee v. Ellison*, 19 Vt. (4 Wash.) 379; *Middlebrook v. Corwin*, 15 Wend. 169; *Goodrich v. Jones*, 2 Hill, 142; *Lassell v. Reed*, 6 Greenl. 222; *Daniel v. Pond*, 21 Pick. 371; to which add Kent's opinion, 2 Com. 347, n. a.

But it is urged upon us, that whatever may be the rule as to agricultural property, it is here immaterial, because the tenancy was not for agricultural purposes, in the ordinary course of husbandry. By his deed, the defendant reserved the possession of the property from its date in September, till the first of April following. He owned the hay and stock from which this manure was made. He was under no obligation to keep either upon the place, except for his own convenience, and he was bound by no duties to the purchaser resulting from contract, either express or implied, except that of giving up the possession on the first of April.

It was substantially, so far as this question is concerned, a reservation of the buildings merely, since the season of farming operations was chiefly passed, and the rights of the parties were rather like those of the lessor and lessee of livery stables, or the like, than those of farming tenants. There would seem to be no doubt that as to this kind of buildings there would be no pretence that the lessor would have any claim to the manure, except such as might result from express contract. *Daniels v. Pond*, 21 Pick. 367; *Lassell v. Reed*, 6 Greenl. 222.

This view strikes us as just and reasonable, and most consistent with the reasonable understanding and expectations of the parties. No one can doubt that this must have been the idea of the defendant, or he would have made his reservation clear in this respect. And it is not easy to

imagine that the plaintiff should leave it a subject for a doubt, if he supposed he was to have this manure, and it was so understood.

Upon this ground we are of opinion there must be

*Judgment for the defendant.*¹

SAWYER v. TWISS.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE. 1853.

[*Reported 26 N. H. 345.*]

TROVER, for fifty loads of manure. Plea, the general issue. The manure in question was made on a farm owned and occupied by the defendant, and was lying in heaps about the barn on said farm. The farm was subject to a mortgage to one Moore. Some of the cattle which made the manure were owned by Moore, and kept by the defendant for him, at a certain price per week, and the rest were owned by the defendant, but were subject to a personal mortgage to Moore. The manure was attached by a deputy sheriff, as the personal property of the defendant, and sold by him at public auction, on an execution issued on a judgment rendered by a justice of the peace against the defendant, and was purchased by the plaintiff in this suit.

Subsequently to the sale, and before the plaintiff had removed the manure, the defendant took it and used it on the farm.

It was agreed that judgment be rendered for the plaintiff, for the value of the manure and interest, or for the defendant, as the opinion of the court should be on the above case.

E. S. Cutter, for the plaintiff.

Clark and Bell, for the defendant.

BELL, J. It has been decided here, that as between grantor and grantee of a farm, the manure lying in heaps in the fields, or deposited about the barns and barn-yards on the premises, passes with the real estate. It is an incident and appurtenance of the land, and part of the real estate, like the fallen timber and trees, the loose stones lying upon the surface of the earth, and like the wood and stone fences erected upon the land, and the materials of such fences when placed upon the ground for use, or accidentally fallen down. *Kittredge v. Woods*, 3 N. H. Rep. 503; *Needham v. Allison*, 4 Foster's Rep. 335; *Connor v. Coffin*, 2 Foster's Rep. 538.

Elsewhere, it has been held, upon reasons which seem to us entirely satisfactory, that manure made by a tenant upon a leased farm, in the absence of any special contract or custom, belongs to the farm as an incident necessary for its improvement and cultivation. It is the prop-

¹ See *Pickering v. Moore*, 67 N. H. 533, *ante*, p. 112; *Fletcher v. Herring*, 112 Mass. 382. As to manure on a public highway, see *Haslem v. Lockwood*, 37 Conn. 500.

erty of the lessor of the farm, subject to the right of the tenant to use it in the cultivation of the land. The tenant has no right to remove it or use it for any other purpose, and it is not liable to be attached or holden for his debts. *Wetherbee v. Ellison*, 19 Vt. Rep. (4 Wash.) 379; *Middlebrook v. Corwin*, 15 Wend. 169; *Goodrich v. Jones*, 2 Hill, 142; *Lassell v. Reed*, 6 Greenl. 222; *Daniels v. Pond*, 21 Pick. 371; 2 Kent's Com. 347, note *a*. And this doctrine is recognized here in *Needham v. Allison*, and *Connor v. Coffin*, above cited.

Some authorities of ancient date lay down the law that manure in heaps, before it is spread upon the land, is a personal chattel, which goes to the executor and not to the heir. 11 Vin. Ab. 175, Executors 32, and *Carver v. Pierce*, Sty. 66, and *Yearworth v. Pierce*, S. C. All. 31, there cited; 1 Vin. Ab. 444, Actions for words R. a. 5; S. C. Toll. Exors. 150; Math. Exors. 27. And we regard the doctrine as correct, that manure generally is personal property, and as such goes to the executor. *Pinkham v. Gear*, 3 N. H. Rep. 484. But we think it may be doubted whether, notwithstanding the single decision on which these books rest, there is not a great weight of argument as well as of authority for holding that, even as between the heir and the executor, the manure made upon a farm, in the ordinary course of husbandry, is to be regarded as belonging to the farm, and an incident of the real estate. In *Needham v. Allison*, it was held that the rule would be different as to manure made in stables and otherwise, not in the course of husbandry.

It is not easy to draw any line of distinction between manure in heaps and that which is spread upon the land; and we are of the opinion that whatever rule is adopted with regard to the manure upon a farm, which is not absolutely incorporated with the soil and become entirely undistinguishable from it, must be applied to all, in whatever form it may be, whether it is in heaps at the barn windows, or lying about the barnyards, whether it is drawn out in piles for the purpose of fermentation, or mixed with other ingredients for compost, or it has been drawn out and thrown down in small parcels, for the purpose of being spread upon the land or placed in the hills of corn or potatoes. Whatever the rules of good husbandry or considerations of sound policy require us to decide in regard to this article, in one of its forms, is equally necessary and proper to be held in relation to it in all its states. We consider it as being very closely analogous to the muck and marl beds which are found on many farms, and which are extensively used in many places as dressing for land, or mixed into compost for the same purpose. We regard it, too, as having strong resemblances, as to its connection with the realty, with the fences upon the land, which, though attached to the land in many cases by gravity alone, are yet beyond question parts of the realty itself. *Ripley v. Paige*, 12 Vt. 353; *Gibson v. Vaughan*, 2 Bailey, 389; *Goodrich v. Jones*, 2 Hill, 142.

Adopting, then, the opinion which we think supported by the strongest reasons, that the manure made upon a farm, in the ordinary course

of husbandry, is to be regarded as an incident or appurtenant of the real estate, — a part of the freehold, — the owner of the fee must of course have the authority and right to sell and dispose of it, to remove it from the land at his pleasure; and when so separated it becomes, like the trees and fencing materials when separated, or like muck and marl when dug up and removed, merely personal property. But this right of the owner is a personal right, clearly so in the other cases mentioned, and it is not in the power of any officer, for the security of a debt, to attach and remove standing trees or fences, however slight their connexion with the earth, nor to dig or remove muck or marl, to dig plaster or coal, or carry away the loose stones from the surface. And upon equally strong, perhaps much stronger, grounds we think an officer cannot be permitted to remove the manure upon a farm, which is indispensable to its beneficial cultivation.

In one respect the resemblance fails between such manure and the fences, muck, &c., to which we have compared it. It is an article of annual production, and it strikes many persons, that as the tenant is in general entitled to the produce of the property he hires, during the time he hires it, he must also be entitled to the manure as a part of the annual produce. But the duty of a tenant to treat his leasehold according to the rules of good husbandry is quite as strong as his right to take the annual produce. If this duty comes in conflict with the supposed right, it seems to us that sound policy, as it regards the community, forbids that a tenant should take, as a part of the produce of a farm, that which is necessary to its cultivation, and the removal of which is an appropriation not of the profits, but substantially of a part of the capital of the property leased.

Manure, regarded as a part of the annual produce of a farm, differs essentially from the crops generally and other productions of a farm. They are raised for the purpose of removal; they are designed, perhaps with the exception of hay and fodder, to be sold and disposed of as a part of the income and profits of the land, while the manure is never, unless by the most thriftless husbandman, sold or disposed of off the farm, nor used for any purpose but the improvement of the land. The annual crops are liable, by our law, to attachment and execution, when they have become mature and fitted for harvesting, and not before. They may then be properly removed, but the manure can never be removed from a farm or used elsewhere, consistently with sound public policy or private advantage.

Upon the views suggested, we are of opinion that the manure made upon a farm in the ordinary course of husbandry, is a part of the real estate, and that it cannot be attached or taken on execution separately from the land; that when so attached the owner has no other rights over it than he has over the fences, except that of using it for the purpose of improving the land; that he may be restrained from removing or disposing of it otherwise, pending the attachment, and that an officer attaching and removing such manure, without consent of the owner, is

liable as a trespasser, and that neither he nor his vendee acquires any right to such manure by a levy upon and sale of it.

There must, therefore, be

Judgment for the defendant.

FAY v. MUZZEY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1859.

[Reported 13 Gray, 53.¹]

ACTION of contract upon the probate bond of Elizabeth Muzzey as administratrix of the estate of her husband, Benjamin Muzzey, brought for the use of Moses G. Cobb, administrator *de bonis non* of said Benjamin. Trial in this court in Middlesex at October term, 1852, before *Cushing, J.*, who reported the following case for the judgment of the full court: —

“The case, after default of the defendants, was referred to an auditor, who reported that he found due to the plaintiff from the defendants the sum of \$4,872.68; and also the further sum of \$47.58 for manure, unless upon the following facts the court should determine otherwise as matter of law: It was proved that a large pile of manure, containing some eight or ten cords, not broken up nor rotten, and not in a fit condition for incorporation with the soil, stood on the land of the said Benjamin at the time of his decease, and so continued until after the appraisal returned by said Elizabeth into the probate court; and this manure was taken from the barn-yard of the homestead of said deceased.

“Also the further sum of \$31.72, unless upon the following facts the court should determine otherwise as matter of law: It was proved that certain other manure, duly set down in said Elizabeth’s inventory, and without controversy the personal property of said Benjamin at the time of his decease, was, after the date of her said appraisal, by her authority spread upon the lands which descended from her intestate; that this was done judiciously, in an agricultural view, and in the usual course of good husbandry. This manure was taken from the hotel stable standing on the land of said deceased. All the real estate of the deceased was afterwards sold for the payment of debts.”

This case was argued in writing.

M. G. Cobb, for the plaintiff.

J. P. Converse, for the defendants.

HOAR, J. 1. The court are of opinion that manure from the barn-yard of the homestead of the intestate, standing in a pile upon his land, although “not broken up nor rotten, and not in a fit condition for incorporation with the soil,” is not therefore assets in the hands of his

¹ Part of this case relating to another point is omitted.

administratrix, and that she is not chargeable therewith as a part of his personal estate. Manure, made in the course of husbandry upon a farm, is so attached to and connected with the realty, that, in the absence of any express stipulation to the contrary, it passes as appurtenant to it. This has been so decided as between landlord and tenant, in the cases of *Daniels v. Pond*, 21 Pick. 367; *Lussell v. Reed*, 6 Greenl. 222; and *Middlebrook v. Corwin*, 15 Wend. 169. The reason of the rule is, that it is for the benefit of agriculture, that manure, which is usually produced from the droppings of cattle or swine fed upon the products of the farm, and composted with earth or vegetable matter taken from the soil, and the frequent application of which to the ground is so essential to its successful cultivation, should be retained for use upon the land. Such is unquestionably the general usage and understanding, and a different rule would give rise to many difficult and embarrassing questions.

The same doctrine was applied, as between vendor and vendee, in *Kittredge v. Woods*, 3 N. H. 503, and in *Goodrich v. Jones*, 2 Hill (N. Y.), 142. The doctrine as to fixtures and incidents to the realty is always most strictly held, as between heir and executor, in favor of the heir, and against the right to disannex from the inheritance whatever has been affixed thereto. *Elwes v. Maw*, 3 East, 51.

The circumstance that a thing is not permanently affixed to the freehold, but is capable of detachment, and is even temporarily detached from it, is not conclusive against the right of the owner of the land. Thus keys of doors go to the heir, and not to the executor. *Wentworth on Executors*, 62. And in *Goodrich v. Jones*, *ubi supra*, it was held, that fencing materials, which have been used as a part of the fence, accidentally or temporarily detached from it, without any intent of the owner to divest them permanently from that use, do not cease to be a part of the freehold. In *Bishop v. Bishop*, 1 Kernan, 123, the same principle was applied to the case of hop-poles, which had been taken up and laid in heaps for preservation through the winter; and it was held, that they would pass by a conveyance of the land.

2. The manure from the hotel stable, which is agreed to have been personal estate, and was included in the inventory, must be accounted for by the administratrix; and it is no sufficient account to say that she has expended it upon the real estate which has since been sold for the payment of debts. There is no way in which it can be made certain that it has increased the amount received from the sale of the real estate; and if this were established, an administratrix has no right thus to expend the personal property of her intestate.

STRONG v. DOYLE.

SUPREME JUDICIAL COURT. 1872.

[Reported 110 Mass. 92.]

TORT for the conversion of thirty tons of manure. At the trial in the Superior Court, before *Wilkinson, J.*, the plaintiff introduced evidence that he sold and conveyed a farm to the defendant on February 11, 1870, by a deed describing it by metes and bounds, and containing no reservation except a right for the plaintiff to occupy the land until April 1; that the manure in question was on this farm; that the defendant, while negotiating for the purchase of the farm, made a separate and distinct oral agreement for the purchase of the manure; that it was agreed that the plaintiff should put up the manure for sale at auction, and the defendant should have it if he was the highest bidder; that in March the plaintiff advertised the manure for sale at auction; but that, at the time and place advertised, the defendant forbade the sale, claimed the manure under his deed, and afterwards spread it upon the land.

On this evidence the judge ruled that the plaintiff could not maintain his action, and directed a verdict for the defendant, which was returned. The plaintiff alleged exceptions.

C. Delano and *J. C. Hammond*, for the plaintiff.

C. E. Smith and *S. T. Spaulding*, for the defendant.

COLT, J. It was said in *Fay v. Muzzey*, 13 Gray, 53, that manure made in the course of husbandry upon a farm is so attached to and connected with the realty that, in the absence of any express stipulation to the contrary, it passes as appurtenant to it. This rule is applied in whatever situation or condition the material is before it is finally expended upon the soil. It is till then an incident of the real estate of such peculiar character that, while it remains only constructively annexed, it will be personal property if the parties interested agree so to treat it. Such an agreement, though it be unwritten, does not come within the Statute of Frauds, and is not to be rejected, although contemporaneous with the conveyance of the real estate. An oral contract for the sale of it is valid. In the case of fixtures which are not incorporated with, but merely annexed to the freehold, the rule is well settled that the Statute does not apply. *Browne* on St. of Frauds, § 234; *Hallen v. Runder*, 1 C., M. & R. 266; *Bostwick v. Leach*, 3 Day, 476.

In the case at bar, evidence was offered that the defendant, while negotiating for the farm and before its conveyance to him, made a separate and distinct agreement for the purchase of the manure, to be his only in case he was the highest bidder at public auction; that the plaintiff advertised the sale as agreed, and the defendant at the sale for the first time claimed that the manure belonged to him under the

plaintiff's deed, and that it was afterwards spread upon the land by him. The deed was in the usual form, conveying the land only, and reserving only to the plaintiff the right of occupying until the first of April following.

In the opinion of the court, this evidence supports the plaintiff's title to the property in dispute. It proves an independent preliminary agreement, by which it was severed from its relations to the realty before the deed was made. It serves to ascertain the subject matter upon which the deed was intended to operate. 1 Greenl. Ev. § 286; *Ropps v. Barker*, 4 Pick. 239. Such an agreement, made upon good consideration, with the owner of land before it is conveyed, is, as a mode of severance, as effectual as a sale by the owner to a stranger, or an agreement between landlord and tenant by which the manure becomes personal property. *Noble v. Sylvester*, 42 Vt. 146; *Ford v. Cobb*, 20 N. Y. 344.

This case differs from *Noble v. Bosworth*, 19 Pick. 314, cited by the defendant. There the owner of land erected a dye-house upon it, in which dye-kettles, firmly secured in brick, were set up. And it was held that a verbal reservation of the kettles, before or at the time of the delivery of the deed of the land, was inadmissible to control the ordinary effect and operation of the deed. The property in dispute had been actually annexed to the building, and intentionally incorporated with the real estate by the owner for the purpose of permanent improvement. While in that condition before severance it was subject to the rules which govern the title and transfer of real estate, and passed by the deed. Here no act of severance was necessary to detach the manure from the land, and the agreement of the parties was sufficient.

*Exceptions sustained.*¹

COLLIER v. JENKS.

SUPREME COURT OF RHODE ISLAND. 1895.

[Reported 19 R. I. 137.]

TRESPASS *de bonis asportatis*. Certified from the District Court of the Sixth Judicial District on exceptions.

June 29, 1895. MATTESON, C. J. This is an exception to the decision of the District Court of the Sixth Judicial District in an action of trespass *de bonis asportatis* for breaking and entering the plaintiff's close and taking and carrying away and converting to the defendant's use a quantity of manure. It was admitted at the trial that the manure, amounting to about nine cords, was made on the farm of the defendant's wife; that it had been hauled out of the barn yard and piled on a lot containing about seven-eighths of an acre which, subse-

¹ See *Goodrich v. Jones*, 2 Hill, 142.

quently, on December 23, 1893, was conveyed by the defendant and his wife to the plaintiff. The defendant offered evidence tending to prove an oral reservation of the manure at the time of the conveyance and an agreement between him and the plaintiff that he might remove the manure in the following spring. The court excluded the evidence on the ground that the manure was appurtenant to the land on which it was piled and passed under the deed of it to the plaintiff; and that no oral reservation was effectual to retain title to the manure.

The record shows that no exception was taken at the trial to the exclusion of testimony and we cannot, therefore, consider that part of the defendant's brief based on exceptions to the exclusion of testimony. *Meyers v. Briggs*, 11 R. I. 180. Exception, however, within the time permitted by the Judiciary Act was taken to the decision of the court awarding the plaintiff \$45, the value of the manure. This exception will enable us to review the decision of the court and to set it aside if, on the evidence reported, it is erroneous.

Manure made on the farm in the usual course of husbandry is so far regarded as an incident of the realty or appurtenant to it that, in the absence of any agreement concerning it, it will pass under a deed of the farm. The rule is one of policy, designed to promote the interests of agriculture. We see no reason for its application when the sale is, not of the farm, but only of a small parcel of land off the farm on which the manure happens to be piled. *Cessante ratione, lex ipsa cessat*. There is nothing in the nature of manure prior to its actual incorporation with the soil which makes it necessary to regard it as a part of the realty. It may be sold by the owner of a farm separately from the land. Such a sale amounts to a severance of it from the land and constitutes it personal estate; *French v. Freeman*, 43 Vt. 94; or it may be the subject of an oral reservation prior to or contemporaneous with a conveyance of the land and thereby become personal estate; *Strong v. Doyle*, 110 Mass. 92. Manure made in livery stables, or in barns not connected with farms, or otherwise than in the usual course of husbandry, forms no part of the realty on which it may be piled, but is regarded as personal estate. *Needham v. Allison*, 4 Foster, 355; *Daniels v. Pond*, 21 Pick. 367; *Lassell v. Reed*, 6 Greenl. 222; *Parsons v. Camp*, 11 Conn. 525.

The conveyance to the plaintiff having been, not of the farm, but only of a lot of seven-eighths of an acre, we are of the opinion that the manure did not form a part of the land conveyed because it happened to be piled on it at the time of the conveyance; and, hence, that the court below erred in awarding the value of the manure to the plaintiff.

Exception sustained and case remitted to the District Court of the Sixth Judicial District for a new trial.

John W. Hogan, for plaintiff.

John E. Goldsworthy, for defendant.

CHAPTER VII.

WASTE.

A. *Nature and Kind of Waste.*

ST. 52 HEN. III. ST. OF MARLBOROUGH *alias* MARLBIDGE (1267), c. 23, § 2. Also fermors, during their terms, shall not make waste, sale, nor exile of house, woods, and men, nor of anything belonging to the tenements that they have to ferm, without special license had by writing of covenant,¹ making mention that they may do it; which thing, if they do, and thereof be convict, they shall yield full damage, and shall be punished by amerciamment grievously.

ST. 6 EDW. I. ST. OF GLOUCESTER (1278), c. 5. It is provided also that a man from henceforth shall have a writ of waste in the Chancery against him that holdeth by law of England, or otherwise for term of life, or for term of years, or a woman in dower; and he which shall be attainted of waste shall lose the thing that he hath wasted, and moreover shall recompence thrice so much as the waste shall be taxed at.

REG. BREV. 73. The king to the sheriff, &c., greeting. If A. shall give you security of prosecuting his claim, then summon B. by good summoners that he be before our justices at Westminster on the octave of St. Michael to show wherefore since it has been provided by the common council of our realm of England that it is not lawful for any one to commit waste, sale, or destruction of lands, houses, woods, or gardens demised to them for term of life or of years, the same B. has made of the lands, houses, woods and gardens in L., which the said A. demised to him for the term of the life of the said B. (*or* which the said A. demised to him for a term of years, *or* which F., the father or mother or other ancestor of the said A. whose heir he is, demised to the said B., for the life of the said B. or for a term of years) waste, sale, and destruction, to the disherison (*ad exhæredationem*) of A., and against the form of the Statute aforesaid, as he says: And have there the summoners and this writ.

ANONYMOUS.

KING'S BENCH. 1345.

[*Reported Fitz. Ab. Wast, pl. 80.*]

WASTE, and it was found by the inquest, where it was pleaded for the party that there was no waste, that as to a kitchen, it was burned

¹ See *Dowman's Case*, 9 Co. 10 b.

by a strange woman without the knowledge of the defendant (because he was living elsewhere); and that to rebuild this kitchen he cut the oaks in the woods and hedges near the close; and that the house is now better than it was before the fire; and that he had also cut down a certain number of oaks in the woods and hedges near the close and sold them, and had cut down some to repair the houses, and had cut down one which lay there yet unsold.

Pole prayed judgment on the verdict for the plaintiff because all that is found should be adjudged waste by the form of his plea, wherefore the defendant ought to have pleaded this matter if he wished to have availed himself of it.

WILUGHBY [C. J.]. The fire is waste for the want of good watch.

THORPE [J.]. Now lately here on a writ of waste it was found by an inquest taken on default that the Welsh arrived on the sea-coast and burned a manor, and it was adjudged no waste, so here.

WILUGHBY [C. J.]. Against the Welsh the party can never have disturbance. But do you thnk if your household [*? main*] lodges a stranger who puts the houses in fire and flame, that that will not be adjudged waste? As if he would say it was. Wherefore the fire is adjudged waste, and so the kitchen is wasted; but the cutting to repair the house is not waste, and as to that which is cut and not sold, that is waste, and that which is cut for repairs, although it was not pleaded, is adjudged no waste, wherefore the court awards that the plaintiff recover the place wasted and treble damages.

THE ABBOT OF SHIRBOURNE'S CASE.

COMMON PLEAS. 1411.

[*Reported Year Book, 12 Hen. IV. 5.*]

THE Abbot of Shirbourne bought a writ of waste.¹

Norton traversed the waste except in a barn, and said that half of the barn had fallen before the lease, and as to the other half, he said that it was unroofed by a sudden storm, and before he could roof it, the plaintiff entered on him and was seised on the day of the purchase of the writ, and he demanded judgment, if he could maintain an action for this waste.

Skrene. We have alleged that he has done waste in a barn, which we let to him, and he says that the waste was made in one half before the lease, which is no answer to our action because, &c., and if he has made a new barn there himself, and waste has been done in that, our action is maintainable.

HILL [J.]. If the matter is so, allege it on your part. for his answer is good.

¹ Part of the case is omitted.

Skrene. Well, then as to the other half his plea is double, one is the sudden storm, the other is our entry on him, wherefore we pray he may be held to one of them.

HILL [J.]. The plea is not double, because the effect of this plea is your entry upon him before he could repair the unroofing.

Skrene. If I traverse the entry, he will rely against me [*reliera sur moy*] on the sudden storm, which excuses him from waste; for if I let houses for a term of years, and they are unroofed by sudden chance, I shall have no action of waste for that.

HILL [J.]. What you say is not law, for although at the beginning it will not be adjudged waste made by him, but by the act of God, yet if he suffers the house to be unroofed, by reason of which the timber is injured, he shall answer for this waste, because it is his own fault, and by law he is bound to roof the house.

Skrene. If the whole house is blown down by a sudden wind, I shall not make a new one.

HILL [J.]. I grant it; but when the timbers are standing, which are the substance of the house, and they fall for lack of roofing, it is clearly waste.

HANKFORD [J.]. If I do waste in tenements which I hold for term of years, and within the term I am put out by the lessor, it is a question whether he has an action of waste or not, namely, during the term; and it is proved here by the count that the term still continues; and yet if he wishes to say that the houses were unroofed by your fault and not by a sudden wind, he will be concluded by the entry which he made without cause, wherefore the plea seems double.

And then *Norton* alleged the cause of the entry of the plaintiff specially; viz., that the lease was made by indenture on condition, that if waste was done, he could re-enter, and by reason of the unroofing he re-entered, wherefore, &c.

HANKFORD [J.]. Again you prove by your plea that his entry was tortious, and so the plea is double.

HILL [J.]. The plaintiff can say that the defendant had sufficient time before his entry to have repaired the house, and did not repair it, and so prove the waste in the defendant's default, and so prove his entry lawful by the condition aforesid; wherefore

HANKFORD [J.] to *Norton*. Be advised, &c.¹

¹ "Waste and destruction are nearly equivalent, and are used indifferently in reference to houses, woods, and gardens; but exile can be used when serfs are manumitted, and wrongly ejected from their tenements; but the chance of fire, or an unexpected event of that kind, excuses all tenants." *Fleta*, lib. 1, c. 12 § 20.

"In an action of waste brought against tenant by the curtesy, tenant for life, tenant for years, or tenant in dower, which before hath been named in this Act, the entry of the plea of the tenant is *quod predict' (talis) non fecit vastum*, and yet all these by construction of law shall answer for the waste done by any stranger, for he in the reversion cannot have any remedy but against the tenant, and the tenant shall have his remedy against the wrong-doer, and recover all in damages against him, and by this means the loss shall light upon the wrong-doer; for voluntary waste and permissive waste is

LIT. § 71. Also, if a house be leased to hold at will, the lessee is not bound to sustain or repair the house, as tenant for term of years is tied.¹ But if tenant at will commit voluntary waste, as in pulling down of houses, or in felling of trees, it is said that the lessor shall have an action of trespass for this against the lessee.² As if I lend to one my sheep to tathe his land, or my oxen to plough the land, and he killeth my cattle, I may well have an action of trespass against him, notwithstanding the tending.

Co. LIT. 57 a. “*If a house be leased to hold at will, the lessee is not bound, &c.*” For the Statute of Gloucester above mentioned extends not to a tenant at will, and therefore for permissive waste, the lessor hath no remedy at all.

“*But if tenant at will commit voluntary waste, &c.*” And true it is, that if tenant at will cutteth down timber trees, or voluntarily pull down and prostrate houses, the lessor shall have an action of trespass against him, *quare vi et armis*; for the taking upon him power to cut timber or prostrate houses, concerneth so much the freehold and inheritance, as it doth amount in law to a determination of his will; and so hath it been adjudged.

Co. LIT. 53 a, 53 b. Waste, *Vastum dicitur a vastando*, of wasting and depopulating: and for that waste is often alleged to be in timber, which we call in Latin *maremium*, or *maresmium*, or *maresmium*, it is good to fetch both of them from the original. First, *timber* is a Saxon word. Secondly, *maremium* is derived of the French word *marreim*, or *marrein*, which properly signifieth timber.

An action of waste doth lie against tenant by the curtesy, tenant in dower, tenant for life, for years, or half a year, or guardian in chivalry, by him that hath the immediate estate of inheritance, for waste or destruction in houses, gardens, woods, trees, or in lands, meadows, &c., or in exile of men to the disherison of him in the reversion or remainder. There be two kinds of waste, viz., voluntary or actual, and permissive. Waste may be done in houses, by pulling or prostrating them down, or by suffering the same to be uncovered, whereby the spars, or rafters, plachers, or other timber of the house are rotten. But if the house be uncovered when the tenant cometh in, it is no waste in the tenant to suffer the same to fall down. But though the house be ruinous at the tenant's coming in, yet if he pull it down, it is waste unless he re-edify it again. Also, if glass windows (though glazed by

all one to him that hath the inheritance. But if the waste be done by the enemies of the king, the tenant shall not answer for the waste done by them, for the tenant hath no remedy over against them. The same law it is if the waste be done by tempest, lightning, or the like, the tenant shall not answer for it. It is adjudged in 9 E. 2, that if thieves burn the house of tenant for life, without evil keeping of lessee's for lives fire, the lessee shall not be punished therefore in an action of waste; *nota* the case of fire, &c.” 2 Inst. 303.

¹ Tenant for years is liable for permissive waste. *Davies v. Davies*, 38 Ch. D. 499; *Moore v. Townshend*, *post*, p. 663.

² *Phillips v. Covert*, 7 Johns. 1, *acc.*

the tenant himself) be broken down, or carried away, it is waste, for the glass is part of his house. And so it is of wainscot, benches, doors, windows, furnaces, and the like, annexed or fixed to the house, either by him in the reversion, or the tenant.

Though there be no timber growing upon the ground, yet the tenant, at his peril, must keep the houses from wasting. If the tenant do or suffer waste to be done in houses, yet if he repair them before any action brought, there lieth no action of waste against him, but he cannot plead *quod non fecit vastum*, but the special matter.

A wall, uncovered when the tenant cometh in, is no waste if it be suffered to decay. If the tenant cut down or destroy any fruit trees growing in the garden or orchard, it is waste; but if such trees grow upon any of the ground which the tenant holdeth out of the garden or orchard, it is no waste.

If the tenant build a new house it is waste, and if he suffer it to be wasted, it is a new waste. If the house fall down by tempest, or be burnt by lightning, or prostrated by enemies, or the like, without a default of the tenant, or was ruinous at his coming in, and fall down, the tenant may build the same again with such materials as remain, and with other timber which he may take growing on the ground for his habitation; but he must not make the house larger than it was. If the house be discovered by tempest, the tenant must, in convenient time, repair it.

If the tenant of a dove-house, warren, park, vivary, estanges, or the like, do take so many, as such sufficient store be not left as he found when he came in, this is waste: and to suffer the pale to decay, whereby the deer are dispersed, is waste.

And it is to be observed that there is waste, destruction, and exile. Waste properly is in houses, gardens (as is aforesaid), in timber trees (viz., oak, ash, and elm, and these be timber trees in all places), either by cutting of them down, or topping of them, or doing any act whereby the timber may decay. Also, in countries where timber is scant, and beeches or the like are converted to building for the habitation of man, or the like, they are all accounted timber. If the tenant cut down timber trees, or such as are accounted timber, as is aforesaid, this is waste; and if he suffer the young germins to be destroyed, this is destruction. So it is, if the tenant cut down underwood (as he may by law), yet if he suffer the young germins to be destroyed, or if he stub up the same, this is destruction.¹

Cutting down of willows, beech, birch, aspe, maple, or the like, standing in the defence and safeguard of the house, is destruction. If there be a quickset fence of white thorn, if the tenant stub it up, or suffer it to be destroyed, this is destruction; and for all these, and the like destructions, an action of waste lieth. The cutting of dead wood, that is, *ubi arbores sunt aridæ, mortuæ, cavæ, non existentes mare-*

¹ See *Phillipps v. Smith*, 14 M. & W. 589.

*miu*m, nec portantes fructus, nec folia in æstate, is no waste; but turning of trees to coals for fuel, when there is sufficient dead wood, is waste.

If the tenant suffer the houses to be wasted, and then fell down timber to repair the same, this is a double waste. Digging for gravel, lime, clay, brick, earth, stone, or the like, or for mines of metal, coal, or the like, hidden in the earth, and were not open when the tenant came in, is waste; but the tenant may dig for gravel or clay for the reparation of the house, as well as he may take convenient timber trees.

It is waste to suffer a wall of the sea to be in decay, so as by the flowing and reflowing of the sea, the meadow or marsh is surrounded, whereby the same becomes unprofitable; but if it be surrounded suddenly by the rage or violence of the sea, occasioned by wind, tempest, or the like, without any default in the tenant, this is no waste punishable. So it is, if the tenant repair not the banks or walls against rivers, or other waters, whereby the meadows or marshes be surrounded, and become rushy and unprofitable.

If the tenant convert arable land into wood, or *e converso*, or meadow into arable, it is waste, for it changeth not only the course of his husbandry, but the proof of his evidence.¹

The tenant may take sufficient wood to repair the walls, pales, fences, hedges, and ditches, as he found them; but he can make no new: and he may take also sufficient ploughbote, firebote, and other housebote.

The tenant cutteth down trees for reparations, and selleth them, and after buyeth them again, and employs them about necessary reparations, yet it is waste by the vendition; he cannot sell trees, and with the money cover the house.² Burning of the house by negligence or mischance is waste.

Co. Litt. 54 a. There is waste of a small value, as Bracton saith, *Nisi vastum ita modicum sit propter quod non sit inquisitio facienda*. Yet trees to the value of three shillings and four pence hath been adjudged waste, and many things together may make waste to a value.

Co. Litt. 54 b. A man hath land in which there is a mine of coals, or of the like, and maketh a lease of the land (without mentioning any mines) for life or for years, the lessee for such mines as were open at the time of the lease made, may dig and take the profits thereof. But he cannot dig for any new mine, that was not open at the time of the lease made, for that should be adjudged waste.³ And if there be

¹ See *Atkins v. Temple*, 1 Ch. Rep. 18; *Fenmier v. Maund*, Ib. 116; *Cole v. Greene*, 1 Lev. 309.

² See *Gower v. Eyre*, G. Coop. 156.

³ *Astry v. Ballard*, 2 Mod. 193, *acc.* So as to undeveloped oil lands. *Marshall v. Mellon*, 179 Pa. 371. A tenant for life may open the earth in new places to pursue a vein of mineral already worked. *Clavering v. Clavering*, 2 P. Wms. 338. As to what will constitute such an abandonment of mines as will prevent a subsequent life tenant from mining, see *Gaines v. Green Pond Company*, 33 N. J. Eq. 603.

See also *Kier v. Peterson*, 41 Pa. 357; *Westmoreland Coal Co.'s Appeal*, 85 Pa. 344; *Moore v. Rollins*, 45 Me. 493.

open mines, and the owner make a lease of the land, with the mines therein, this shall extend to the open mines only, and not to any hidden mine; but if there be no open mine, and the lease is made of the land together with all mines therein, there the lessee may dig for mines, and enjoy the benefit thereof, otherwise those words should be void. I have been the more spacious concerning this learning of waste, for that it is most necessary to be known of all men.¹

COUNTESS OF SHREWSBURY'S CASE.

KING'S BENCH. 1600.

[Reported 5 Co. 13.]

THE Countess of Shrewsbury brought an action on the case against Richard Compton, a lawyer of the Temple, and declared, that she leased to him a house at will, & *quod ille tam negligenter & improvide custodivit ignem suum, quod domus illa combusta fuit*: to which the defendant pleaded not guilty, and was found guilty, &c. And it was adjudged that for this permissive waste no action lay, against the opinion of Brook in the abridgment of the case of 48 E. 3, 25; Wast. 52. And the reason of the judgment was, because at the common law no remedy lay for waste, either voluntary or permissive, against lessee² for life or years, because the lessee had interest in the land by the act of the lessor, and it was his folly to make such lease, and not restrain him by covenant, condition, or otherwise, that he should not do waste. So and for the same reason, a tenant at will shall not be punished for permissive waste. But the opinion of Littleton is good law, fol. (15) 152. If lessee at will commits voluntary waste, *scil.* in abatement of the houses, or in cutting of the woods, there a general action of trespass lies against him. For as it is said in 2 and 3 Phil. & Mar. Dyer 122 *b*, when tenant at will takes upon him to do such things which none can do but the owner of the land, these amount to the determination of the will, and of his possession, and the lessor shall have a general action of trespass without any entry: and there 15 E. 4, 20 *b*, is cited, that if a bailee of goods as of a horse, &c. kill them, the bailor shall have a general action of trespass, for by the killing the privity was determined. But it was agreed that in some cases, when there is a confidence reposed in the party, the action upon the case will lie for negligence, although the defendant comes to the possession by the act of the plaintiff. As 12 E. 4, 13 *a*, *b*, where a man delivers a horse to another to keep safe, the defendant *equum illum tum negligenter custodivit, quod ob defectum*

¹ See Co. Lit. 316 *a*.

Waste can be committed only in the thing demised. It is not waste if the lessee cut down trees excepted from the demise. *Goodright v. Vivian*, 8 East, 190.

² But see 2 P. & M. Hist. (2d ed.) 9.

bonæ custodiæ interiit; the action on the case lies for this breach of the trust. So 2 H. 7, 11, if my shepherd, whom I trust with my sheep, and by his negligence they be drowned, or otherwise perish, an action upon the case lies: but in the case at bar it was a lease at will made to the defendant, and no confidence reposed in him; wherefore it was awarded, that the plaintiff take nothing by her bill.¹

BOWLES'S CASE.

KING'S BENCH. 1615.

[*Reported 11 Co. 79.*]

LEWIS BOWLES, Esq., brought an action upon the case upon trover against Haseldine Bury the younger (which began in the King's Bench, Hil. 10 *Jacobi Regis*, Rot. 1319), and declared that he was possessed of thirty cart loads of timber, and lost them, and that they came into the hands of the defendant, and that he 20 Feb. *anno 9 Jac. Regis*, at Norton, in the county of Hertford, converted them to his own use; and upon not guilty pleaded, the jury gave a special verdict to this effect. Thomas Bowles, Esq., grandfather of the said Lewis, was seised of the Manor of Norton-Bury, in the said county in fee, and, 1 Sept. *anno 12* by indenture, betwixt him on the one part, and William Hide and Leonard Hide of the other part, in consideration of a marriage to be had betwixt the said Thomas Bowles and Anne, daughter of the said William Hide, &c. covenanted, that after the said marriage had and solemnized, that the said Thomas, his heirs and assigns, would stand seised of the said manor of Norton-Bury, to the use of the said Thomas and Anne, for the term of their lives, without impeachment of waste, and after their deceases, to the use of their first issue male, and to the heirs male of such issue lawfully begotten, and so over to the second, third, and fourth issue male, &c. and for want of such issue, to the use of the heirs males of the body of the said Thomas and Anne lawfully begotten; and for want of such issue, to the use of Thomas Bowles, son and heir apparent of Thomas Bowles the grandfather, and the heirs males of his body issuing, and for want of such issue, to the use of the heirs of the body of the said Thomas and Anne lawfully issuing. Which marriage was solemnized accordingly, and the said Thomas the grandfather, and Anne, had issue John; and afterwards the said Thomas the grandfather died without any issue on the body of Anne, but the said John; after whose death the said Anne entered into the said manor, and was thereof seised, with the said remainder over, as aforesaid, and afterwards the said John Bowles died, and afterwards Thomas the son

¹ Putting an excessive weight of farm products in a barn, whereby the structure is injured, is voluntary waste, for which a tenant at will is liable. *Chalmers v. Smith*, 152 Mass. 561.

conveyed by fine his remainder to the use of Lewis Bowles the plaintiff, and Diana his wife, and the heirs males of his body; and the said Anne being so seised of the said manor, with the remainder over as aforesaid, *viz.* 20 Feb. *an Reg. Jac. reg. 9*, a barn, parcel of the said manor *per vim ventorum et tempestat' penitus subvers. et ad terram defect' fuit*, and that the said thirty cart loads of timber, in the declaration mentioned, were parcel of the said barn, and that the said timber was sound and fit for building, wherefore the defendant, as servant of the said Anne, and by her command, took the said timber, and carried it out of the limits of the said manor to Radial, in the same county; and afterwards the said Anne, 24 Feb. *anno 9 Jac. Reg.* made her last will, and thereof made Robert Osborne and Leon. Hide, Knts. her executors, and died, after whose death the plaintiff seized the said timber, and afterward the defendant, by the command of the said executors, converted it to his use; and if upon the whole matter the defendant was guilty or not, the jury prayed the opinion of the court.

And in this case two questions were moved. 1. If upon the whole matter the wife should be tenant in tail after possibility, or that she should have the privilege of a tenant in tail after possibility, *sc.* to do waste, &c. 2. Admitting that she should not have the privilege, &c. if the clause of "without impeachment of waste," shall give her property in the timber so blown down by the wind.

And in this case eight points were resolved by the whole court.

1. That till issue, Thomas the grandfather and Anne, were seised of an estate tail executed *sub modo*, *sc.* until the birth of issue male, and then by the operation of law the estates are divided, *sc.* Thomas and Anne become tenants for their lives, the remainder to the issue male in tail, the reversion to the heirs males of Thomas and Anne, the remainder over as aforesaid; for the estate for their lives is not absolutely merged, but (exists) with this implied limitation until they have issue male. *Vide Chudleigh's Case* in the First Part of my Reports, fol. 120, and *Archer's Case*, fol. 66 b.

2. That tenant in tail, after possibility, has a greater pre-eminence and privilege, in respect of the quality of his estate, than tenant for life, but he has not a greater quantity of estate than tenant for life; in respect of the quality of his estate, it tastes much of the quality of an estate in tail, out of which it is derived: and, therefore, 1. She shall not be punished for waste. 2. She shall not be compelled to attorn. 3. She shall not have aid. 4. On her alienation no *Consimili casu* lies. 5. After her death no writ of intrusion lies. 6. She may join the mise in a writ of right in a special manner, *temp.* E. 1; Wast. 125; 39 E. 3, 16 a, b; 31 E. 3; Aid. 35; 43 E. 3, 1 a; 45 E. 3, 22; 46 E. 3, 13 a, 27; 11 H. 4, 15 a; 7 H. 4, 10 b; 2 H. 4, 17 b; 42 E. 3, 22; 3 E. 4, 11 a; 21 H. 6, 56; 10 H. 6, 1 b; 13 E. 2; *Entre Congeable*, 56; 28 E. 3, 96 b; 26 H. 6; Aid. 77; F. N. B. 203. 7. In an action brought by her, she shall not name herself tenant for life. 18 E. 3, 27 a, a woman brought a *Cui in vita, quod clamat tenere ad vitam*, and maintained it

in her count by a gift in special tail to her and her husband, and that her husband is dead without issue, and the writ for variance of the title abated. 8. In an action brought against her, she shall not be named tenant for life, *sc. quod tenet ad terminum vitæ*. Mich. 39 & 40 Eliz. Rot. 3316, in *Communi Banco, inter Veal et alios quer' et Read def'* in *quid juris clamat*, and the note of the fine supposed that the defendant *tenet ad terminum vitæ*, the defendant demandedoyer of the writ, and of the note of the fine, and had it, and pleaded that he was seised in fee, *absque hoc quod*, the day of the note levied *tenuit pro termino vitæ*, and the jury found that he held as tenant in tail after possibility of issue extinct; and it was adjudged *pro defendente*; for tenant in tail, after possibility, shall not be in judgment of law included in a writ or fine, &c. within the general allegation of a tenant for life. *Vide* 19 E. 3, 1 b.

But as to the quantity, he has but an estate for life; and therefore, if he makes a feoffment in fee, it is a forfeiture of his estate, 13 E. 2; *Entre Cong.* 56; 45 Ed. 3, 22; 21 E. 3, 96 b; 27 Ass. 60; F. N. B. 159. So if fee or tail general descends or remains to tenant in tail after possibility, &c. the fee or estate tail is executed, 32 E. 3, Age 55. 50 E. 3, 4; 9 E. 4, 17 b. And by the Stat. of W. 2, he in reversion shall be received upon his default, 2 E. 2. Resceit 147; 41 E. 3, 12; 20 E. 3; Resceit—; 38 Ed. 3, 33. *Vide* 28 E. 3, 96 b; 39 E. 3, 16 a, b. And an exchange betwixt tenant for life and tenant in tail, after possibility, is good; for their estates are equal.

3. It was resolved, that the estate of a tenant in tail, after possibility, ought to be a remnant and residue of an estate tail, and that by the act of God, and not by the limitation of the party *dispositione legis*, and not *ex provisione hominis*: and therefore if a man makes a gift in tail upon condition, that if he does such an act, that he shall have but for life, he is not tenant in tail after possibility of issue extinct, for that is *ex provisione hominis*, and not *ex dispositione legis*: but it ought to be the remnant and residue of an estate tail, and that by the act of God and the law, *sc.* by the death of one donee without issue. Lit. 6 b; Doct. and Stud. lib. 2, cap. 1, fol. 61; 2 H. 4, 17 b; 26 H. 6; Aid. 77.

If tenants in special tail recover in assise, and afterwards one dies without issue, and afterwards he who survives (who is tenant in tail after possibility) is re-disseised, he shall have a re-disseisin, for it is the same freehold he had before, for it is parcel of the estate tail: and because the wife in the case at bar had the estate for life by limitation of the party, and the estate which she had in the remainder, *sc.* of the tenancy in tail after possibility, was not a larger estate in quantity, and therefore could not merge the estate for life, as has been said before, for this cause the wife was not tenant in tail after possibility.

4. It was resolved, that in this case the wife should have the privilege of a tenant in tail after possibility for the inheritance which was once in her; for now when John the issue male is dead, the privilege which she had in respect of the inheritance which was in her in

remainder shall not be lost. And there is no question but a woman may be tenant in tail after possibility of a remainder as well as of a possession; and therefore if a lease for life is made, the remainder to husband and wife in special tail, the husband dies without issue, now is the wife tenant in tail after possibility of this remainder; and if the tenant for life surrenders to her, as he may (for the life of him in the remainder is higher than the other life) now is she tenant in tail after possibility of possession: and like this case if the father is enfeoffed to him and his heirs with warranty, and the father enfeoffs the son, &c. and dies; in this case the son, although he has the land by purchase, yet he shall take the benefit of the warranty as heir, for he cannot vouch as assignee, and the warranty betwixt the father and him is lost, as it is adjudged in 43 E. 3, 23 b. So here, although the wife cannot claim the estate of tenant in tail after possibility, yet she may claim the privilege and benefit of it. And it was observed, that tenants in special tail at the common law had a limited fee simple; and when their estate was changed by the Statute *De Donis conditional'*, yet there was not any change of their interest in doing of waste: so when by the death of one donee without issue the estate is changed, yet the power to commit waste, and to convert it to his own use, is not altered nor changed for the inheritance which was once in him, *vide* Hil. 2 Jac. Rot. 229, *inter Brooke and Rogers, in Communi Banco*, if a timber tree becomes *arida, sicca, non portans fructus nec folia in æstate, nec existens mæremium*, yet because it was once an inheritance, &c. no tithes shall be paid for it, for that the quality remains, although the state of the tree is altered.

5. That if tenant for life or for years fells timber, or pulls down the houses, the lessor shall have the timber,¹ and because this point was resolved in this court upon a solemn argument in *Liford's Case* at Mich. term, which *vide* before in this book, I will make the shorter report. 1. It is apparent in reason, that the lessee had them but as things annexed to the soil; and therefore it would be absurd in reason, that when by his act and wrong he severs them from the land, that he should gain a greater property in them than he had by the demise. 2. It is without question (as it is resolved in the said case) that the lessor has the general ownership and right of inheritance in the houses and timber trees, and the lessee has but a particular interest, and therefore be they pulled down or felled by the lessee or any other, or by wind or tempest blown down, or by any other means disjoined from the inheritance, the lessor shall have them in respect to his general ownership, and because they were his inheritance; and as to *that*, the resolutions in *Herlaken-den's Case*, in the Fourth Part of my Reports, fol. 63 a, were affirmed for good law, and *Paget's Case* in the Fifth Part of my Reports, fol. 76 b, for although he cannot punish them in an action of waste at the common law because it was his own act, and in his lease he has not made provision by covenant or condition; yet the inheritance and general owner-

¹ *Lester v. Young*, 14 R. L. 579, *acc.*

ship remain in the lessor, and the lessee (as hath been said) has but a special interest in the houses and timber-trees so long as they are annexed to the land, and this appears by the Statute of Marlebridge, c. 26. *Item firmarii vastum, &c. non facient, nisi specialem inde habuerint concessionem per scriptum conventionis, mentionem faciens quod hoc facere possint*, whereby it appears, that the lessees for life or years, which then were, could not rightfully fell the trees, or pull down the houses, unless the lessor had granted by deed to do it. In which it was also observed, that at the time of the making of the same Act, the said clause of "without impeachment of waste" was in use, which proves that it was to such purpose that the lessee might commit waste, and dispose it to his own use, which he could not do without such clause.

3. Every lessee for life and years ought by the law to do fealty upon his oath, and it would be against his oath to waste the houses and timber-trees. And, *nota*, reader, upon this Statute of Marlebridge lies a prohibition of waste against the lessee for life, and lessee for years, to prohibit them that they shall not do waste before any waste was done, as it was against tenant in dower, and tenant by the curtesy at the common law. *Vide* Bract. 316, the judgment in waste at the common law. Tenant in dower or by the curtesy have as high an estate as lessee for life; and it appears that it was not lawful for tenant by the curtesy or in dower to do waste, *ergo* no more for tenant for life; the only difference was, that a prohibition of waste lay against tenant in dower, and by the curtesy, at the common law, and not against the lessees till the said Statute of Marl. And to prove what interest the lessee for life has in the trees at the common law, it appears by Bracton (who wrote before the Statute of Glou'), lib. 4, *tract' De Assisa novæ dis. c. 4, f. 217. Si quis vastum fecerit, vel destructionem in tenemento quod tenet ad vitam suam, in eo quod modum excedit, et rationem, cum tantum conceditur ei rationabile estoverium, facit transgressionem, et si talis impediatur, ille tenens assisam non habebit, intentio talis liberabit a disseisina, quia in eo quod tenens abutitur male utendo, et debitum usum et modum debitum excedendo, non potest dicere quod disesisitus est, quia tantum rationabilis usus ei conceditur*; which proves directly, that it was a wrong in the lessee for life to do waste, or destruction at the common law. And it was resolved, if an house falls down *per vim venti* in the time of such lessee for life or for years, or in the time of the tenant in dower, or tenant by the curtesy, &c. that such particular tenants have a special property in the timber to rebuild the like house as the other was for his habitation: as if they fell a tree for reparation, they have a special property to that purpose in it, and therewith agree 44 E. 3, 5 b; 44 E. 3, 44 b; 29 E. 3, 3; and 10 E. 4, 3 a. But the said particular tenants cannot give or sell the tree so felled, for the general property is in the lessor; and therefore, Lit. f. 15, holds, that if I bail goods to another to manure his land, now he has a special property in them to that purpose; and in that case, if he kills them, a general action of trespass lies against him. See 11 H. 4, 17 a, & 23 b.

6. The pre-eminence and privilege which the law gives to houses which are for men's habitation was observed. First, an house ought to have the priority and precedency in a *Præcipe quod reddat* before land, meadow, pasture, wood, &c. F. N. B. 2, &c.; for his house is his castle, *et domus sua est unicuique tutissimum refugium*. 2. The house of a man has privilege to protect him against arrest by virtue of process of law at the suit of a subject, *vide Semaine's Case*, in the Fifth Part of my Reports, fol. 91 b. 3. It has privilege against the king's prerogative, for it was resolved by all the judges, Mich. 4 Jac. that those who dig for saltpetre, shall not dig in the mansion-house of any subject without his assent; for then he, or his wife or children, cannot be in safety in the night, nor his goods in his house preserved from thieves and other misdoers. He who kills a man *se defendendo*, or a thief who would rob in the highway, by the common law shall forfeit his goods: but he who kills one that would rob and spoil him in his house, shall forfeit nothing. 3 E. 3; Corone 330 & 26 Ass. 23, &c. 5. If there be two joint-tenants of a wood or arable land, the one has no remedy against the other to make inclosure or reparations for safeguard of the wood, or corn: but if there be two joint-tenants of an house, the one shall have a writ *De reparatione facienda* against the other, and the words of the writ are *ad reparationem et sustentationem ejusdem domus tenetur*, F. N. B. 127 a, b. If a man is in his house, and hears that others will come to his house to beat him, he may call together his friends, &c. into his house to aid him in safety of his person; for, as it has been said, a man's house is his castle and his defence, and where he properly ought to remain: but if a man be threatened if he comes to such a fair or market that he shall be beaten, in that case he cannot make such assembly, but he ought to have remedy by surety of the peace. 21 H. 7, 39 a.

7. The clause of "without impeachment of waste" gives a power to the lessee, which will produce an interest in him if he executes his power during the privity of his estate, and therefore to examine it in reason. 1. These words *absque impetitione vasti*, are as much as to say, without any demand for waste; for *impetitio* is derived from *in* and *peto*, and *petere* is to demand, and *petitio* is a demand, and *sine impetitione* is without any manner of demand or impeachment: then this word *demand* is of a large extent; for if a man disseises me of my land, or takes my goods, if I release to him all actions, yet I may enter into the land or take my goods, as Lit. holds, f. 115, and therewith agree 19 Ass. 3; 19 H. 6, 4 b; 21 H. 7, 33 b; 30 E. 3, 19, for by the release of the action, the right or interest is not released, but if in such case I release all demands, that will bar me, not only of my action, but also of my entry and seizure, and of the right of my land, and of the property of my goods; as it was resolved in *Chauncy's Case*, 34 H. 8; Br. Release 90; 2 H. 7, 6 b, the king made one sheriff *sine computo*, thereby he shall have the revenues which belong to his office to collect to his own use. But if the words had been *absque impetit' vasti per*

aliquod breve de vasto, then the action only would be discharged, and not the property in the trees, but that the lessor after the fall of them might seise them: and this difference appears in 3 Edw. 3, 44 a, b, in *Walter Idle's Case*, where a lease was made without being impeached, or impleaded for waste, upon which it was collected that these words "without being impleaded," without these words "without being impeached for waste," were not sufficient to bar the lessor of his property, and that if the lessor had granted that the lessee might do waste, he thereby had power not only to do waste, but also to convert it to his own use; and that the words of the said Act of Marlebridge, and the Statute *De Prærogativa Regis*, c. 16, do prove where it is said, that the king shall have *annum, diem, et vastum*, *sc.* which is as much as to say, that he shall have the trees, &c. at his own disposition.

2. It was said, that the continual and constant opinion of all ages was, that those words gave power to the lessee to do waste to his own house, and it would be dangerous now to recede from it, and as it is said in 38 Edw. 3, 1 a, by the judges (so we say in this case) we will not change the law which has always been used; and it is well said in 2 Hen. 4. 18 b: It is better that there should be a defect, than that the law should be changed; and the opinion of Wray, C. J., and Manwood, cited in *Herlakenden's Case*, was not judicial but *prima facie* upon an arbitrament without any argument, and perhaps upon the sight of 27 Hen. 6, Waste 8; and therefore, although the Chief Justice argued in this case, against their opinions, yet it was with great reverence to them, saying with Aristotle in the like case, *amicus Plato, amicus Socrates, sed magis amica veritas*; and *qui non libere veritatem pronunciat, proditor veritatis est*.

And the truth of this case appears by Littleton in his Chapter of Conditions, fol. 82, where he puts this case, If a feoffment be made upon such conditions, that the feoffee shall give the land to the feoffor, and to the wife of the feoffor, to have and to hold to them and to the heirs of their two bodies begotten, the remainder to the right heirs of the feoffor; in that case if the husband dies, living the wife, before any estate in tail made to them, then ought the feoffee by the law to make an estate to the wife as near the condition and as near the intent of the condition as he can make it, *sc.* to lease the land to the wife for term of her life without impeachment of waste, the remainder to the heirs of the body of her husband of her begotten, the remainder to the right heirs of the husband: and the reason why the lease shall be made in this case to the wife without impeachment of waste is, that the estate shall be to the husband and his wife in tail, and if such estate had been made in the life of the husband, then after the death of the husband she had had an estate in tail, which estate is without impeachment of waste, and so it is reasonable that a man should make an estate as near the intent of the condition as he can, which case directly proves, that tenant for life without impeachment of waste has as great power to do waste and to convert it at his own pleasure, as tenant in tail had. That these words without

"impeachment of waste," are sufficient words to give tenant for life such power, *vide* 2 H. 4, 5, b, and the *Lord Cromwell's Case* in the Second Part of my Reports, fol. 81 a, b, 82 a; and for this clause of without impeachment of waste, 3 Ed. 3, 44; 8 Ed. 3, 4 a, b, 35 a; 24 Ed. 3, 32; 43 Edw. 3, 5 a; 5 Hen. 5, 8; 27 Hen. 6; Waste, 8; 4 E. 4, 36 a; 20 Hen. 7, 10; 28 H. 8; Dyer, 10; and so the *Quere* in the said book of 27 H. 6, well resolved.

And see the opinion of Statham in abridging the said book against it.

But the said privilege of without impeachment of waste, is annexed to the privy of estate, 3 Edw. 3, 44, by Shard and Stone; if one who has a particular estate without impeachment of waste, changes his estate, he loses his advantage, 5 Hen. 5, 9 a. If a man makes a lease for years without impeachment of waste, and afterwards he confirms the land to him for his life, now he shall be charged for waste, 28 Hen. 8; Dyer, 10 b. If a lease is made to one for the term of another's life, without impeachment of waste, the remainder to him for his own life, now he is punishable for waste, for the first estate is gone and drowned; so of a confirmation. It was adjudged in *Ewen's Case*, Mich. 28 and 29 Eliz. that where tenant in tail after possibility of issue extinct granted over his estate, that the grantee was compelled in a *Quid juris clamat* to attorn, for by the assignment such privilege is lost; and that judgment was affirmed in the King's Bench, in a writ of error, and therewith agrees 27 H. 6; Aid. in Statham; *vide* 29 E. 3, 1b.

The heir at common law should have a prohibition of waste against tenant in dower, but if the heir granted over his reversion, his grantee should not have a prohibition of waste: for it appears in the Register 72 that such assignee in an action of waste against tenant in dower shall recite the Statute of Gloucester; *ergo*, he shall not have a prohibition of waste at common law, for then he should not recite the Statute. *Vide* F. N. B. 55 c; 14 H. 4, 3; 5 H. 5 (7) 17 b.

Lastly, it was resolved, that the said woman by force of the said clause of without impeachment of waste, had such power and privilege, that though in the case at bar no waste be done, because the house was blown down *per vim venti* without her fault, yet she should have the timber which was parcel of the house, and also the timber trees which are blown down with the wind; and when they are severed from the inheritance either by the act of the party, or of the law, and become chattels, the whole property of them is in the tenant for life by force of the said clause of "without impeachment of waste." And for this cause judgment was given *per omnes Justiciarios una voce, quod querens nihil caperet per billam*.¹

¹ "Albeit tenant in tail *apres* possibility of issue extinct doth hold but for life, and so within the letter of this law, yet is he out of the meaning thereof in respect of the inheritance which was once in him, in respect whereof his estate is by law punishable of waste, but his assignee shall be punished for waste by this Statute." 2 Inst. 302.

In *Williams v. Williams*, 12 East, 209, it was held that the property in timber, cut by a tenant in tail after possibility of issue extinct, vested in the tenant.

PANTON v. ISHAM.

COMMON PLEAS. 1802.

[Reported 3 Lev. 359.]

CASE, and declares on the custom of the realm, that every one ought to keep their fire so, that by default thereof no damage should happen to another; and that the defendant so negligently kept his fire, that six stables, six haylofts, and three lodging-rooms of the plaintiff were thereby burnt. The defendant pleads not guilty, and on a special verdict it was found that the plaintiff was seised of the stables, &c., and demised one of the stables to the defendant for a week for 8s. and so from week to week at 8s. per week, as long as both parties should please, and demised the other five stables to divers other persons for divers terms yet to come, whereby they were possessed; and being so possessed, the fire, by the defendant's negligence, six weeks afterward begun in the stable demised to the defendant, and burnt the same and all the other stables, &c. And if for the plaintiff, for the plaintiff, &c. damages 100*l.* and tax the damages severally, *viz.* 15*l.* for the stable demised to the defendant, and 85*l.* for the others, and costs 20s. And upon several arguments last term and this term, judgment was given for the plaintiff for the 85*l.* and for the defendant for the 15*l.* and they resolved the writ to be good, though it were *alicui alio* (for which no damages should be) and not *vicino*, as was objected. 2dly, that for the stable demised to the defendant himself, no action lay; for the demise to him could be no more than a term for three weeks, and for the residue he was tenant at will, against whom no action lay for negligent waste, as 5 Co. 14. the *Countess of Shrewsbury's Case*.¹ But 3dly, as to the stables demised to the others, the action well lies, as if they were the stables of strangers, and not of the lessor; for as to them there is no privity between the plaintiff and defendant, but as to them they are as nothing, or as to other persons. 4thly, although the other stables, &c. were in lease to others, who may have an action as to the possession for their losses, yet the lessor may also have an action for the damages to his inheritance, as was formerly adjudged in this Court in the case of *Beddingfield v. Onslow*. Hill 36, 37 C. 2. *Levinz* of counsel for the plaintiff.

¹ *Lothrop v. Thayer*, 138 Mass. 466, *acc.* In *Robinson v. Wheeler*, 25 N. Y. 252, the tenancy was probably for years.

HARROW SCHOOL v. ALDERTON.

COMMON PLEAS. 1800.

[Reported 2 B. & P. 86.]

THIS was an action of waste on the Statute of Gloucester for ploughing up three closes of meadow-land, and converting the same into garden-ground, and building thereupon, to the damage of the plaintiffs of £500. Plea, Not guilty.

The cause was tried before *Heath*, J., at the Westminster sittings after last Trinity Term, when the jury found a verdict for the plaintiff with three farthings damages, being one farthing for each close.

In the Michaelmas Term following, *Cockell*, Serjt., obtained a rule, calling on the plaintiff to show cause why the judgment should not be entered up for the defendant, on account of the smallness of the damages recovered, on the principle that *de minimis non curat lex*; and cited in support of the application Bro. Abr. tit. Waste, pl. 123; Co. Lit. 54 a; 2 Inst. 306; Cro. Car. 414, 452; Finch's Law, lib. 1, cap. 3, § 34, adopted 3 Black. Com. 228; Vin. Abr. tit. Waste N; and Buller's N. P. 120.

Shepherd, Serjt., now showed cause.

LORD ELDON, CH. J. I confess, that when this application was first made, I was not aware, that under the circumstances of the case the defendant was entitled to demand judgment; but my Brother Heath has satisfied me that the application is supported by the current of authorities. I do not indeed see precisely on what ground those decisions have proceeded; though I can easily conceive many cases in which it may be extremely unconscientious for a plaintiff to take advantage of his judgment, where such small damages have been recovered as in this case. As, if the owner of land suffer his tenant to lay out money upon the premises, and then bring an action of waste to recover possession when the land may have been improved to ten times the original value. The cases do not appear to authorize the distinction contended for by my Brother Shepherd. Whether the waste committed be by alteration of the property, or by deterioration, still the jury, in estimating the damages, take into consideration the injury which the plaintiff has sustained; and in this case the jury have estimated the damage which these plaintiffs have sustained, by the alteration of their property, at three farthings only. The courts of common law seem to have entertained a sort of equitable jurisdiction in cases of this kind.

HEATH, J. This doctrine prevailed as early as the time of Bracton, who wrote before the Statute of Gloucester. With respect to the distinction taken, there is no reason why pecuniary damages should not be assessed for the alteration of property as well as for the deterioration. Thus, if a tenant convert a furze-brake, in which game have

bred, into arable or pasture, by which its real value would be improved, but its value to the landlord depreciated, it would be the business of the jury to assess damages to the landlord thereon.

ROOKE, J. I am of the same opinion.

*Rule absolute.*¹

FERGUSON v. ———

Nisi Prius. 1797.

[*Reported 2 Esp. 590.*]

THIS was an action to recover damages for suffering an house of plaintiff's to be out of repair.

The case on the part of the plaintiff was, that the defendant had rented an house of him, as tenant at will, at a rent of £31 per annum, which he had quitted; after the defendant had given up the possession, the house was found to be very much out of repair, and the plaintiff had an estimate made of the sum necessary to put it into complete and tenantable repair, which sum he sought to recover in the present action.

LORD KENYON said: It was not to be permitted to plaintiff to go for the damages so claimed. A tenant from year to year is bound to commit no waste, and to make fair and tenantable repairs, such as putting in windows or doors that have been broken by him, so as to prevent

¹ "We are therefore of opinion that the pulling down a barn, taken absolutely, is such waste as subjects the copyhold tenant to a forfeiture. But there is another principle applicable to waste, that is, the smallness of the value, and there are a great number of old authorities to say, that if the value be very small, the consequences of waste do not attach.

"They will be found collected in 2 Roll's Abr. 824; Comyn's Dig. Tit. Copyhold. M. 3, and Waste, E. 1; Viner's Abr. Tit. Copyhold, K. c., and Waste N; 2 Saunders, 259, *Green v. Cole*, notes. See also *The Keepers of Harrow School v. Alderton*, 2 Bos. & Pul. 86. Some of these authorities are not directly in point, for they are decided upon the Statute of Gloucester, and in actions of waste, and between landlord and tenant. And it is laid down by Lord Chancellor Loughborough, in *Dench v. Bampton*, 4 Ves. Jun. 706 (see *Richards v. Noble*, 3 Mer. 673), that an action of waste will not lie between a lord of a manor and a copyholder. But they are illustrations of the principle, that where there are no damages there can be no waste; and to this effect is the case of *Barret v. Barret*, Hetley, 35, where C. J. Richardson said, 'The law will not allow that to be waste which is not any ways prejudicial to the inheritance.'

"Upon the whole, there is no authority for saying that any act can be waste which is not injurious to the inheritance, either, first, by diminishing the value of the estate, or, secondly, by increasing the burden upon it, or, thirdly, by impairing the evidence of title. And this law is distinctly laid down by C. J. Richardson in *Barret v. Barret*, cited at the bar from Hetley's Reports. This case is entirely clear of the two former grounds; and as the jury have found that the defendant did no damage to the estate, it follows that there was no waste, and no forfeiture. The rule must, therefore, be made absolute." Per DENMAN, C. J., in *Doe d. Grubb v. Burlington*, 5 B. & Ad. 507, 516, 517 (1833).

See *Barry v. Barry*, 1 Jac. & W. 651; *Jones v. Chappell*, L. R. 20 Eq. 539.

waste and decay of the premises ; but in the present case the plaintiff has claimed a sum for putting on a new roof on an old worn-out house ; this I think the tenant is not bound to do, and that the plaintiff has no title to recover it.¹

HERNE v. BEMBOW.

COMMON PLEAS. 1813.

[Reported 4 Taunt. 764.]

THE plaintiff declared in case in the nature of waste, and alleged certain buildings in the defendant's occupation to be ruinous, prostrate, and in decay for want of needful and necessary reparations. There was also a count for obstructing a way. The defendant suffered judgment by default. The premises were demised by the plaintiff to the defendant by lease, which contained no covenant to repair. Upon the execution of a writ of inquiry, the under-sheriff directed the jury to inquire what sum it would take to put the premises into tenantable repair. The jury however rejected that rule, and gave very small damages.

Shepherd, Serjt., now moved to set aside the inquisition, and that the case might be submitted to another jury, contending that the damages ought to have been the sum sufficient to enable the defendant to keep up the premises in as good repair as they were in when the defendant took them.

PER CURIAM. Whatever duties the law casts on the tenant, the law will raise an *assumpsit* from him to perform (if there be no covenant in his lease for the performance), but that is a very different case from a declaration framed in tort like this. If this action could be maintained, a lessor might declare in case for not occupying in an husband-like manner, which cannot be. The facts alleged are permissive waste: an action on the case does not lie against a tenant for permissive waste. *Countess of Shrewsbury's Case*, 5 Co. 13. If therefore we were to grant this motion, the defendant would meet the plaintiff in a manner he would not like.

Rule refused.

SMYTH v. CARTER.

BEFORE SIR JOHN ROMILLY, M. R. 1853.

[Reported 18 Beav. 78.]

IN 1852 the defendant became owner of a public-house and premises which had formerly been built on part of the waste of Bedminster, of

¹ See *ante*, p. 632, note.

As to the responsibility of a tenant for lives renewable forever, see *Bewes, Waste*, 258 *et seq.*

which the plaintiffs were the lords of the manor. Rent had been paid by the previous owners to the plaintiffs.

The plaintiffs alleged, that the defendant was pulling down the house in order to erect a brewery in its place, which, as it would overlook the plaintiffs' residence, would form an intolerable nuisance. In July last, the plaintiffs obtained an injunction to restrain the defendant from so doing, and the defendant now moved to dissolve it.

Mr. Roupell and *Mr. C. M. Roupell*, in support of the motion.

Mr. R. Palmer and *Mr. Osborne*, for the plaintiffs.

THE MASTER OF THE ROLLS. Assuming the plaintiffs to be landlords, and the defendant tenant, I entertain no doubt, that this court will restrain a tenant from pulling down a house and building any other which the landlord dislikes. It is not sufficient to show that the house proposed to be built is a better one; and the fact of the defendant's showing that the landlord does not know his own interest will not affect the judgment of the court in any respect whatever. The landlord has a right to exercise his own judgment and caprice, whether there shall be any change; and if he objects, the court will not allow a tenant to pull down one house and build another in its place.

In this case, the defendant alleges he is owner in fee, subject to a quit rent. I shall not now determine or express any opinion on that subject, but I shall preserve the rights of the parties until the question has been determined at law.¹

¹ "A doubt has been stated, indeed, in a note to 2 Saund. 252 b, whether a tenant for years is liable for permissive waste, and if he were not, then a covenant by the landlord to repair would not amount to an implied permission to the tenant to omit to repair. These doubts arise from three cases in the Common Pleas: *Gibson v. Wells*, 1 N. R. 290; *Herne v. Benbow*, 4 Taunt. 764; *Jones v. Hill*, 7 Taunt. 392. Upon examining these cases, none of which appears to be well reported, the court seems to have contemplated the case only of a tenant at will in the two first cases, and in the last no such proposition is stated, that a tenant for years is not liable for permissive waste. We conceive that there is no doubt of the liability of tenants for terms of years, for they are clearly put on the same footing as tenants for life, both as to voluntary and permissive waste, by Lord Coke, 1 Inst. 53; *Harnet v. Maitland*, 16 M. & W. 257; though the degree of repairs required for a tenant from year to year, by modern decisions, is much limited." *Per PARKE, B.*, in *Yellowly v. Gower*, 11 Exch. 274, 293, 294.

In *Doherty v. Allman*, 3 Ap. Cas. 709, fields, on which were buildings that had been used as store warehouses, and afterwards as artillery barracks and dwellings for married soldiers, were demised, part in 1798, for a term of 999 years, and part in 1824, for a term of 988 years. The buildings having been for some time unoccupied, and, as was said, falling into decay, the assignees of the leases proposed to change the buildings into dwelling-houses. The reversioner brought a bill for an injunction to restrain the making of these changes, on account of the proximity to his private residence of the buildings proposed to be altered. The Vice-Chancellor of Ireland granted a perpetual injunction; but the Court of Appeal ordered the injunction to be dissolved, without prejudice to the plaintiff's right to proceed at law, and the House of Lords affirmed the order.

In *Klie v. Von Broock*, 56 N. J. E. 18, a lessee for years cut an opening for a door in a party wall on the premises. The lessee was held to have committed waste, and was ordered to close the opening.

HONYWOOD v. HONYWOOD.

CHANCERY. 1874.

[Reported L. R. 18 Eq. 306.]

WILLIAM PHILIP HONYWOOD by his will devised all his real estates to trustees, upon trust to manage the same, and, after certain payments therein mentioned, to pay the rents and profits to his wife during her life or widowhood, with remainders over.

The testator died in 1859, and the suit was instituted by Mrs. Honywood for the administration of his estate. Various inquiries had been directed by the decree, and orders had been made from time to time for felling part of the timber on the estate, and directing that some part of such felled timber might be used for repairs on the estate, and that the remainder might be sold, and the proceeds paid into court and invested, and the income thereof paid to the widow as tenant for life.

It appeared that part of the money thus paid into court represented the proceeds of the sale of trees, which, according to the evidence of the agent for the estate, were ripe and fit to be cut, and would not improve but lessen in value, and that it would be for the benefit of the estate if they were cut.

The question which came before the court, on further consideration of the suit, was, as between the plaintiff, as equitable tenant for life, and the remainderman, whether the proceeds of the sale of the trees, which were felled in the regular course of thinning, or which were fit to be cut, and would not improve by standing, and which were injurious to the other timber, belonged absolutely to the plaintiff, or whether she was only entitled to the income thereof when invested.

Mr. Fischer, Q. C., and *Mr. Hanson*, for the plaintiff.

Mr. Southgate, Q. C., and *Mr. Freeling*, for the trustees of the will, and *Mr. Crossley*, for the heir-at-law.

SIR G. JESSEL, M. R. As I understand the law, it is this: The tenant for life may not cut timber. The question of what timber is, depends, first, on general law, that is, the law of England; and, secondly, on the special custom of a locality.

By the general law of England, oak, ash, and elm are timber, provided they are of the age of twenty years and upwards, provided also they are not so old as not to have a reasonable quantity of usable wood in them, sufficient, according to a text-writer (see *Gibbons on Dilapidations*, p. 215; *Countess of Cumberland's Case*, Moore, 812; *Herlakenden's Case*, 4 Rep. 63 b), to make a good post. Timber, that is, the kind of tree which may be called timber, may be varied by local custom. There is what is called the custom of the country, that is, of a particular county or division of a county, and it varies in two

ways. First of all, you may have trees called timber by the custom of the country, — beech in some countries, hornbeam in others, and even white-thorn and black-thorn, and many other trees, are considered timber in peculiar localities, — in addition to the ordinary timber trees. Then again, in certain localities, arising probably from the nature of the soil, trees of even twenty years old are not necessarily timber, but may go to twenty-four years, or even to a later period, I suppose, if necessary ; and in other places the test of when a tree becomes timber is not its age but its girth. These, however, are special customs. Once arrive at the fact of what is timber, the tenant for life, impeachable for waste, cannot cut it down. That I take to be the clear law, with one single exception, which has been established principally by modern authorities in favor of the owners of timber estates, that is, estates which are cultivated merely for the produce of salable timber, and where the timber is cut periodically.¹ The reason of the distinction is this, that as cutting the timber is the mode of cultivation, the timber is not to be kept as part of the inheritance, but part, so to say, of the annual fruits of the land, and in these cases the same kind of cultivation may be carried on by the tenant for life that has been carried on by the settlor on the estate, and the timber so cut down periodically in due course is looked upon as the annual profits of the estate, and, therefore, goes to the tenant for life. With that exception, I take it, a tenant for life cannot cut timber ; therefore, I hold in this case, it not being a timber estate, that the tenant for life cannot cut timber at all.

The next question to be decided is, what can the tenant for life cut ? The tenant for life can cut all that is not timber, with certain exceptions. He cannot cut ornamental trees, and he cannot destroy “germins,” as the old law calls them, or stools of underwood ; and he cannot destroy trees planted for the protection of banks, and various exceptions of that kind ; but, with those exceptions, which are waste, he may cut all trees which are not timber, with again an exception, that he must not cut those trees which, being under twenty years of age, are not timber, but which would be timber if they were over twenty years of age. If he cuts them down, he commits waste, as he prevents the growth of the timber. Then, again, there is a qualification that he may cut down oak, ash, and elm, under twenty years of age, provided they are cut down for the purpose of allowing the proper development and growth of other timber that is in the same wood or plantation. That is not waste ; in fact, it is for the improvement of the estate, and not the destruction of it, and therefore he is allowed to cut them down. If, therefore, in the course of the proper management of this estate, any oaks, ashes, and elms under twenty years old have been cut down for the purpose of allowing of the growth of the other timber in a proper manner, that would not be waste on the part of the tenant for life, though impeachable for waste.

¹ The correctness of this passage was discussed in *Dashwood v. Magniac*, [1891] 3 Ch. 306, and especially at p. 358 *et seq.*

Then the only other question to be decided is, in whom is the property of the timber cut down vested? There, I think, the law is reasonably clear. If the timber is timber properly so called, that is, oak, ash, and elm over twenty years old (I am not saying anything about exceptional cases), the property in the timber cut down, either by the tenant for life or anybody else, or blown down by a storm, belongs at law to the owner of the first vested estate of inheritance. There is in equity an exception where the remainderman, the owner of the first vested estate of inheritance, has colluded with the tenant for life, to induce the tenant for life to cut down timber, and then equity interferes and will not allow him to get the benefit of his own wrong. There is, again, a second equitable exception, and that is this: that where timber is decaying, or for any special reason it is proper to cut it down, and the tenant for life in a suit properly constituted, to which the remainderman or the owner of the vested estate of inheritance is a party, gets an order of the court to have it cut down, there the court disposes of the proceeds on equitable principles, and makes them follow the interests in the estate. In that case, therefore, the proceeds are invested, and the income given to the successive owners of the estate, until you get to the owner of the first absolute estate of inheritance, who can take away the money.

The same course, as I understand it—there is a decision of Lord Lyndhurst, in *Ormond v. Kynnersley*, 7 L. J. (Ch.) 150, the other way, but modern decisions have settled the law—is adopted in the case of the commission of equitable waste, that is, where ornamental trees, or trees which could not otherwise be cut down even by a tenant for life unimpeachable for waste, are cut down; there also, as I understand it, the proceeds are invested so as to follow the uses of the settlement, that is, to go along with the estate according to the settlement giving the income to the tenant for life, and so on.

Then we come to the property in trees not timber, that is, those which are not timber either from their nature, or because they are not old enough or because they are too old. In all those cases, I take it, the property is in the tenant for life. If he cuts them down wrongfully, and commits waste, the property is still in him, though he has committed a wrong, and would be liable to an action in the nature of waste.¹ I am not sure that would follow in equity. My impression is that equity would say that he should not be allowed to take the benefit of his own wrong, and that he should not be allowed to take the property in those trees he cuts down. This is not the case at common law, and I am not aware that the exact point has been decided in equity.

If the present tenant for life has cut down oak, ash, or elm under twenty years of age, in a due course of cultivation, and for the purpose of improving the growth or allowing the development of timber trees, she

¹ See *Berriman v. Peacock*, 9 Bing. 384.

will be entitled to the proceeds of the trees so cut down; and assuming, when I come to look at the affidavits, that there are some which show that there is such a class of tree cut down, as I understand is actually the case, then I shall direct an inquiry to ascertain what portion of the proceeds she is entitled to.

As regards the future, I think I have said enough, without any further declaration, to show what the tenant for life will be entitled to.

IN RE CARTWRIGHT.

CHANCERY DIVISION. 1889.

[*Reported 41 Ch. D. 532.*]

ADJOURNED summons. John Cartwright, who died in 1850, by his will, dated in that year, devised land in the county of Suffolk unto and to the use of his daughter Mary Anne Cartwright and her assigns for and during the term of her natural life, and from and immediately after her decease to the use of her children, if any, in manner therein mentioned, and if all such children should have departed this life without issue at the time of the decease of his daughter and on failure of her issue, he devised the land to the defendant Newman, his heirs and assigns for ever. The will contained no provisions touching the liability of the testator's daughter for waste.

Mary Anne Cartwright died a spinster on the 15th of December, 1888, and the plaintiff Avis was her executor. At the time of her death the buildings, gates, and fences on the devised land were in a dilapidated condition owing to the necessary repairs not having been done, and the probable cost of the works necessary to place the property in repair was estimated by a surveyor to be £166 12s. 9d. The defendant claimed this sum from the plaintiff, who, on the 28th of March, 1889, took out an originating summons to have it determined whether any and what sum should be allowed and paid to the defendant as compensation in respect of waste suffered by Mary Anne Cartwright during her estate in the premises.

At the hearing, by the direction of the court, the summons was amended by claiming administration of the estate of Mary Anne Cartwright.

Ingpen, for the plaintiff, stated the case.

W. C. Druce, for the defendant:—

As legal remainderman in fee the defendant is entitled to compensation by way of damages for permissive waste by the deceased tenant for life. No doubt it is well established that equity will not interfere by injunction in cases of permissive waste by tenants for life, but the question whether or not an action for damages for permissive waste

can be maintained against a tenant for life upon whom no express duty to repair is imposed by the instrument which creates the estate, rests upon a different footing, and was treated by Lush, J., in *Woodhouse v. Walker*, 5 Q. B. D. 404, 407, as an open question.

[KAY, J.:—Can you show me a case in which a court of common law has given damages in such an action?]

No case can be shown, but principle and authority are in favor of the existence of such a right of action. Before the Statutes of Marlbridge (52 Hen. 3) and of Gloucester (6 Edw. 1, c. 8), though an action for waste lay against a tenant in dower or by the curtesy (whose estates are created by the law), it did not lie against a tenant for life or years. Those statutes were passed to remedy the mischief, and Lord Coke, 2 Inst. 145 treats them as extending to permissive waste, saying, “for he that suffereth a house to decay, which he ought to reparaire, doth the waste”; and there are statements in the notes to *Greene v. Cole*, 2 Wms. Saund. 251, to the same effect.

[KAY, J.:—Lord Coke’s words only include permissive waste where there is an obligation to repair. He says in effect that where the grantor imposes the obligation to repair, it is waste to allow the property to go out of repair.]

Lord Coke’s meaning is that the obligation is imposed by the statutes. In *Harnett v. Maitland*, 16 M. & W. 257, Parke, B., 16 M. & W. 262, referred to the notes to *Greene v. Cole* as an authority that by the Statute of Gloucester the action was given against a lessee for years. It is true that in *Gibson v. Wells*, 1 B. & P. N. R. 290, Sir James Mansfield, C. J., expressed in general language the opinion that at common law an action for permissive waste was not maintainable, but that was a case of tenancy at will, and has no application to tenancy for life or years. *Herne v. Bembow*, 4 Taunt. 764, and *Jones v. Hill*, 7 Taunt. 392, are also usually cited as authorities to the like purport, but those three cases were commented on and explained by Parke, B., in delivering the judgment of the court in *Yellowly v. Gower*, 11 Ex. 274, 294, where he observed that in the first two the court seemed to have contemplated the case only of a tenant at will, and that in the last no such proposition was stated as that a tenant for years was not liable for permissive waste; and he added, “We conceive that there is no doubt of the liability of tenants for terms of years, for they are clearly put on the same footing as tenants for life, both as to voluntary and permissive waste, by Lord Coke, 1 Inst. 53, *Harnett v. Maitland*; though the degree of repairs required for a tenant from year to year, by modern decisions, is much limited.” *Yellowly v. Gower*, 11 Ex. 274, was decided expressly on the ground that a tenant for life is liable for permissive waste, and that there is no distinction in this respect between tenant for life and tenant for years.

[KAY, J., referred to *Powys v. Blagrove*, 4 D. M. & G. 448, and in particular to the statement of the Lord Chancellor, 4 D. M. & G. 458,

to the effect that in the case of a tenant for life even legal liability for permissive waste was very doubtful.]

That is a *mere dictum*, and his Lordship cites the very cases which are disapproved in *Yellowly v. Gower*. The recent case of *Barnes v. Dowling*, 44 L. T. (N. S.) 809, was decided on purely equitable grounds, having no reference to the right of a legal remainderman in fee to maintain an action for waste. Still more recently, in *Davies v. Davies*, 38 Ch. D. 499, Kekewich, J., has followed *Yellowly v. Gower*, and expressly held that a tenant for years is liable for permissive waste.

[He referred also to *Bacon v. Smith*, 1 Q. B. 345, Tudor's Leading Cases (Real Property, 3d ed., pp. 109, 110), and 3 & 4 Will. 4, c. 42, s. 2.]

KAY, J. (without calling upon counsel for the plaintiff).

I am much obliged to you, Mr. Druce, for your argument, to which I have listened with very considerable interest. The result appears to be this: Sir James Mansfield was clearly of opinion that an action for permissive waste would not lie even against a tenant for years. That is clearly shown in the case of *Gibson v. Wells*, 1 B. & P. N. R. 290, which was followed at later dates in *Herne v. Bembow*, 4 Taunt. 764, and *Jones v. Hill*, 7 Taunt. 392, and in the recent case of *Barnes v. Dowling* in the Law Times reports; and when the point was brought before the Lord Chancellor (Lord Cranworth) in the case of *Powys v. Belgrave*, his Lordship, 4 D. M. & G. 458, said this: "Then it was argued, independently of the trust, that it is the duty of a tenant for life to repair — *Equitas sequitur legem*. But even legal liability now is very doubtful." And he referred to *Gibson v. Wells*, 1 B. & P. N. R. 290, and *Herne v. Bembow*, 4 Taunt. 764. His Lordship there decided most certainly that in equity no interference whatever would be made on the ground of permissive waste by a tenant for life. Now, in that state of the authorities, this consideration is to be added. Since the Statutes of Marlbridge and of Gloucester there must have been hundreds of thousands of tenants for life who have died leaving their estates in a condition of great dilapidation. Not once, so far as legal records go, have damages been recovered against the estate of a tenant for life on that ground. To ask me in that state of the authorities to hold that a tenant for life is liable for permissive waste to a remainderman is to my mind a proposition altogether startling. I should not think of coming to such a decision without direct authority upon the point. Such authority as there is seems to me to be against the contention, and in opposition to the positive decisions in *Gibson v. Wells*, *Herne v. Bembow*, and *Jones v. Hill*, 7 Taunt. 392, there are only to be found certain *dicta* of Baron Parke and the late Lord Justice Lush which seem to amount to this, that the words of the Statutes of Marlbridge and Gloucester are sufficient to include the case of permissive waste, at any rate where there is an obligation on the person who has the particular estate not to permit waste, whether that obligation does

or does not exist at the common law in the case of a tenant for life. But at the present day it would certainly require either an Act of Parliament or a very deliberate decision of a court of great authority to establish the law that a tenant for life is liable to a remainderman in case he should have permitted the buildings on the land to fall into a state of dilapidation. I therefore think that this claim must be disallowed.¹

MEUX v. COBLEY.

CHANCERY DIVISION. 1891.

[Reported [1892] 2 Ch. 253.]

UNDER² an agricultural lease, in 1889, of a farm near London, consisting of arable and pasture land, the lessee covenanted to yield up the premises at the end of the term, together with all fixtures and "improvements" which might during the term be fixed to or erected on the demised premises, except such fixtures as should be erected by the lessee, and which he should be at liberty to remove in case the lessor should object to purchase the same by valuation; and also that he would "in all respects cultivate and manage the farm, and every part thereof, in a good, proper, and husbandlike manner, according to the best rules of husbandry practised in the neighbourhood." The lessee converted part of the demised premises into a market garden, erecting glass-houses thereon for the cultivation of hot-house produce for the London market. The lessor brought an action for an injunction to restrain the lessee from converting the farm into a market garden, alleging that his doing so was a breach of covenant and was waste, causing injury to the inheritance. At the trial it was proved that other farms in the neighbourhood had been converted into market gardens, that being found to be the most profitable mode of cultivation.

Kekewich, J., held, that there had been no breach of the covenant, and then said:

Now, is what the defendant is doing waste? Perhaps, technically, it is. But supposing it to be technically waste, it does not follow that the plaintiff would recover damages; and if it followed that he would recover damages, it by no means follows that he would get an injunction.

The case of *Jones v. Chappell*, Law Rep. 20 Eq. 539, was referred

¹ So as to a tenant for life of leasehold. *In re Parry and Hopkin*, [1900] 1 Ch. 160.

Under Kentucky statutes, no action at law lies for permissive waste. *Smith v. Mattingly*, 96 Ky. 228. But it seems equity will give relief; *ib.*

For American legislation on the liability for waste, see Stimson, Am. Stat. Law. § 1332, life-tenant; § 1343, tenant for years; § 3231, tenant in dower; § 3308, tenant by curtesy. See also 1 Washb. Real Prop. (5th ed.), note to *122.

² The statement of facts has been abbreviated. A part only of the opinion is printed. — Ed.

to usefully, because there Sir George Jessel sums up the law shortly in this way (Law Rep. 20 Eq. 541): "The erection of buildings upon land which improve the value of land is not waste. In order to prove waste you must prove an injury to the inheritance." That is borne out by many cases, including *Governors of Harrow School v. Alderton*, 2 Bos. & P. 86, where, on the plaintiff obtaining a farthing damages, the defendant got leave to enter judgment for himself. But I think it unnecessary to refer to any other case on this point except *Doherty v. Allman*, 3 App. Cas. 709. That case seems to me to be entirely consistent with *Jones v. Chappell*, and to lay down the law in a manner applicable to this case. Besides the passage which was read from Lord Cairn's speech (3 App. Cas. 722), there is another passage immediately following, which I think was not read, but which seems to me also in point. His Lordship said (3 App. Cas. 723): "I doubt, further, whether it must not be taken as clear from the evidence here that any jury, or any tribunal judging upon the question of fact, would not say that, if there be technically what in the eye of the Common Law is called waste, still it is that ameliorating waste which has been spoken of in several of the cases cited at the Bar. That which is done if it be technically waste — and here again I will assume in favour of the appellant that it is technically, according to the Common Law, waste — yet it seems to me to be that ameliorating waste which so far from doing injury to the inheritance, improves the inheritance." Lord Blackburn went into the same point, and says, App. Cas. 723: "But even supposing there was an injury, and that there was something for which there might be damages recovered, is it obligatory upon a Court of Chancery to grant an injunction to prevent it under all circumstances? I think not." So again Sir George Jessel, in the case of *Jones v. Chappell*, Law Rep. 20 Eq. 539, to which I have already referred, says, Law Rep. 20 Eq. 542, that the landlord would be entitled to an injunction against the tenant "if the injury were sufficiently serious."

So that all that is asked here being an injunction — and rightly so, because, unless the injunction is granted the plaintiff will get nothing worth having — the question I have to consider is, is there any damage, any injury to the inheritance? It has been proved to me conclusively, that what the defendant is doing, so far from being an injury to the inheritance, is of the greatest possible advantage; and that the addition of these houses, if they are substantially built, and if they are kept in good order, is a most advantageous addition to a farm of this kind in the neighbourhood of London.

I find there is no single point on which the plaintiff succeeds; and, therefore, there must be judgment for the defendant, with costs.¹

¹ See *West Ham Central Charity Board v. East London Waterworks Co.* (1900), 1 Ch. 634.

As to the effect upon the question of waste, of a change in the character of the neighborhood, see *Melms v. Pabst Brewing Co.*, 104 Wis. 7.

KEELER v. EASTMAN.

SUPREME COURT OF VERMONT. 1839.

[Reported 11 *Vi.* 293.]

THE orator's bill stated, in substance, that Seba Eastman, in October, 1828, executed a lease of a certain farm, described in the bill, to the defendant and his wife, during their natural lives, and afterwards, in February, 1832, conveyed his reversionary interest in the farm to the orator. The bill then alleged that the defendant had committed waste on the premises, and especially upon a sugar orchard, by cutting down and carrying away and selling the wood and timber growing thereon, and concluded with a prayer for an injunction to stay further waste, and that the defendant might be decreed to account to the orator for such as had been committed. The substance and amount of the testimony will appear from the opinion of the court, delivered by

BENNETT, Chancellor. The great subject of complaint seems to be the destruction of the sugar orchard, which it is alleged has been cut down and destroyed since the orator became possessed of the reversionary interest, in February, 1832. It is unnecessary to go into the particulars of the evidence, which is quite voluminous, and is evidently somewhat contradictory; but suffice it to say that it seems to be pretty well established from the current of the testimony, that the principal part of the chopping in the sugar orchard was prior to the winter of 1832, and this too by Seba Eastman and Charles Eastman, while Seba had the reversionary interest. The whole evidence taken together satisfies the court that the farm, on the whole, has been managed by the tenant for life, in a prudent and husbandlike manner; and that there have been no acts of wantonness on the part of the defendant, or disregard to the ultimate value of the reversionary interest. Indeed, the value of the property seems to have been enhanced by the betterments and good husbandry of the defendant. We are not aware of any decisions in the courts of this state, laying down any precise rules establishing what acts shall constitute waste; and, indeed, it is difficult there should be any. The general principle is that the law considers every thing to be waste which does a permanent injury to the inheritance. *Coke Litt.* 53, 54. *Jacob's Law Dic.* 6 Vol. 393, *Tit. Waste.* 7 *Com. Dig. Tit. Waste.*

By the principles of the ancient common law, many acts were held to constitute waste — such as the conversion of wood, meadow, or pasture, into arable land, and of woodland into meadow or pasture land — to which we might not, at the present day, be disposed to give that effect. These principles must have been introduced when agriculture was little understood, and they are not founded in reason, and many of them are inconsistent with the most important improvements in the cultivation of the soil. In England that species of wood, which is

designated as timber, shall not be cut, because the destruction of it is considered an injury done to the inheritance; and, therefore, waste. From the different state of many parts of our country a different rule should obtain in our courts; and timber may and must, in some cases, to a certain extent, be cut down, but not so as to cause damage to the inheritance. To what extent a tenant for life can be justified in cutting wood, before he shall be guilty of waste, must depend upon a sound discretion applied to the particular case. It is not in this state waste, to cut down wood or timber, so as to fit the land for cultivation, provided this would not damage the inheritance, and would be according to the rules of good husbandry, taking into view the location and situation of the whole farm. So to remove the dead and decaying trees, whether for the purpose of clearing the land, or giving the green timber a better opportunity to come to maturity, is not waste. We are satisfied that, when the wood or timber is cut with this intent, and is according to a judicious course of husbandry, the tenant is not guilty of waste, though the wood or timber so cut may have been sold, or consumed off of the farm. This farm, it is to be remembered, is comparatively in a state of nature, and the town in which it is situated comparatively new; and what might constitute waste, as applied to one farm in one place, might not, when applied to another, in a different place.

Though the evidence is somewhat contradictory, we are not satisfied that the defendant has gone beyond his rights. The orator's bill is therefore dismissed. But inasmuch as the defendant has made declarations claiming the right to cut off all the wood and timber from the farm if he chose to do it, and threatened the doing of it, the bill was not brought without some apparent cause, and the defendant in this particular is not without fault; it is therefore, dismissed without costs.

R. R. Thrall and *E. N. Briggs*, for orator.

E. L. Ormsbee, for defendant.¹

PYNCHON v. STEARNS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1846.

[Reported 11 Met. 304.]

THIS was an action of waste, in which the plaintiff alleged that the defendant held two parcels of land in Springfield, as tenant for life — the plaintiff having the next estate of inheritance — and had committed

¹ See *Clemence v. Steere*, 1 R. I. 272; *McCullough v. Irvine*, 13 Pa. 438; *King v. Miller*, 99 N. C. 583; *Wilkinson v. Wilkinson*, 59 Wis. 557.

In *Padelford v. Padelford*, 7 Pick. 152, it was held, that it is no defence to an action for waste that the timber cut was exchanged for a greater quantity of firewood. Nor will a court of Equity allow any deductions for sums spent in procuring wood from other sources to be used for fuel. *Phillips v. Allen*, 7 Allen, 115.

sundry acts of waste thereon. Trial before *Shaw*, C. J., whose report thereof was as follows:—

The plaintiff gave in evidence the last will of Edward Pynchon, proved May 30th, 1830, by which he devised the two parcels of land described in the plaintiff's declaration: viz., Pond Meadow and Great Meadow, to his wife, Susan Pynchon, so long as she should remain his widow, remainder to his brother, the plaintiff, in fee: Also an assignment of the same parcels by said Susan, to the defendant, for her life, reserving a yearly rent of thirty dollars. There was evidence tending to show that these parcels of land adjoined each other, and together extended from Main Street, easterly, to and beyond Chestnut Street.

The plaintiff relied on the four following acts of waste: 1st. That the defendant had destroyed fences, or permitted them to fall down or decay, by means of which there was danger that the abutments and landmarks of the estate would be lost, or rendered doubtful, to the damage of the inheritance. 2d. That the defendant had laid out a street or open way, across the land, from one public highway to another, viz., from Main Street to Chestnut Street, by which the character of the land was changed, to the injury of the inheritance, and by which there was danger that the rights of the inheritance might be lost or impaired. 3d. That in order to fit that part of the land, so laid out for a street, for travel, the defendant had ploughed furrows or dug drains along the side thereof, and drawn in large quantities of earth, to raise the same, and thereby had so changed the surface that it ceased to be meadow and pasture land. 4th. That the defendant had erected several wooden houses on the land, and had, for that purpose, caused some portion of the soil to be thrown out from under the sites of those houses, in order to form cellars under them, and to raise the land around them; and had thus changed the character and condition of the land.

As to all that part of the land, nearest to Main Street, called Pond Meadow, the defendant denied the right of the plaintiff to maintain this action, on the ground that the plaintiff, on the 13th of July, 1839, had taken of the defendant a lease thereof during the life of the aforesaid Susan Pynchon, so that the defendant had ceased to be tenant for life, and the plaintiff had become tenant for life, entitled to the possession; and that the relation of tenant for life and remainderman no longer subsisted between the parties. The lease was given in evidence, and the execution thereof admitted. The judge sustained the defendant's objection, and instructed the jury that, as to that part of the land, the action could not be maintained.

As to the alleged acts of waste on the other parcel of land, the defendant made several answers: As to removal or decay of fences, and the loss of boundaries, he denied the fact; and the evidence was left to the jury, with directions not objected to. As to the other alleged acts of waste, the defendant denied that they amounted to waste. And the jury were instructed that the opening of a way through the land, from one highway to another, was not waste. As to the subverting of the

soil, and carrying on earth to raise it, and as to the plaintiff's digging out of a part of the soil for cellars of houses, and raising the soil about the houses, evidence was offered, and though objected to was admitted, tending to show that it was a useful and beneficial mode of husbandry, on similar meadow ground, occasionally to break it up and cultivate it, and again lay it down to grass; that as the soil in question was low and wet, the carrying of earth thereon would benefit it, and make it worth more for agricultural purposes than if it had not been done; that it would cost but little to level it and fit it for cultivation. Whereupon the jury were instructed that if breaking up meadow land occasionally was a judicious and suitable mode of husbandry, the changing of the surface of the soil from meadow, by breaking up and cultivating it, was not waste; that if the cost of levelling would be small, and if, after deducting such cost, the land, over which the road had been built, and on which houses had been erected, would, in case of their removal, be equally (or more) valuable for agricultural purposes, including ploughing and cultivation, and fitting and laying it down to grass, as if it had not thus been changed and built upon, then the laying out and filling up of the road, and removing the soil, for the building of houses and the erection of houses thereon, did not constitute waste.

The jury were also requested to say (if they should find that the estate would be of less value for agricultural purposes, supposing the buildings to be all removed), whether it would, on the whole, be equally or more valuable to the owner of the inheritance, on the hypothesis of the buildings' remaining thereon at the determination of the life estate.

The jury returned a verdict for the defendant, and, on being inquired of, stated that they were of opinion that the estate would be worth more to the owner of the inheritance, for agricultural purposes, even if the houses were taken off, than if the acts of the defendant, in raising and filling up the road, and digging the soil for building, had not been done.

Verdict to be set aside, and a new trial granted, if any of the foregoing instructions, unfavorable to the plaintiff, were wrong.

D. Cummins and *F. Cummins*, for the plaintiff.

B. R. Curtis and *R. A. Chapman*, for the defendant.

WILDE, J. This is an action of waste, and the case comes before us on exceptions to the instructions to the jury at the trial. The premises described in the writ were formerly the property of Edward Pynchon, and were devised by him to Susan Pynchon, his wife, so long as she should remain his widow, remainder to the plaintiff. The defendant holds under an assignment from the said Susan.

It was proved at the trial that the plaintiff had taken of the defendant a lease of part of the premises during the life of the said Susan; and it was ruled by the court that, as to that part of the premises, the action could not be maintained. That this ruling was correct, cannot, we think, admit of a doubt. By this lease to the plaintiff, he became

the owner of the whole estate. The estate for years immediately merged in the remainder in fee; and the plaintiff entered, as it is understood, before the alleged waste. If, however, the lease had been given after the waste, no action of waste could be maintained after the merger of the estate, and after the entry of the plaintiff under the lease from the defendant.

If it be said that the reservation in the lease to the plaintiff prevented the merger, the answer is, that the reservation did not, and could not, by the well-established rules of construction, limit or divest the estate expressly demised to the plaintiff. The defendant only reserved the right to erect buildings on the premises; but no estate for life or for a term of years is reserved; and if it had been reserved, it would have been repugnant to the terms of the lease limiting and demising the estate for life to the plaintiff.

As to the stipulation for the payment of rent, we consider that as a personal covenant of the plaintiff. No right of entry is reserved for the non-payment of rent; and that covenant can no more prevent a merger than it can prevent the vesting of the estate demised.

As to the alleged acts of waste on the other part of the premises, the plaintiff relied upon sundry facts which are not disputed; namely, that the defendant had opened a way through the premises from one public highway to another; and that the defendant had subverted the soil, by digging out part of the soil for cellars of houses by him erected; and that he had ploughed the lands, dug drains, and had drawn in large quantities of earth, thereby raising the land and changing the surface thereof. The defendant introduced evidence to show that these acts of the defendant were beneficial and not prejudicial to the plaintiff, and did not constitute waste. On this evidence the jury were instructed that the opening of the way was not waste; and that if breaking up meadow land occasionally was a judicious and suitable mode of husbandry, the changing the surface by breaking up and cultivating it was not waste; and that the removing the soil for the building of houses, and the erecting them, and digging drains, if the estate on the whole would be equally or more valuable to the owner of the inheritance, would not be waste.

The general rule of law in respect to waste is, that the act must be prejudicial to the inheritance. It is defined by Blackstone (3 Bl. Com. 223) to be "a spoil and destruction of the estate, either in houses, woods, or lands." It is true, however, that it has been held in England, that to change the nature of the property by the tenant, although the alteration may be for the greater profit of the lessor, was waste. So in England, if the tenant converts arable land into wood, or *e converso*, or meadow into plough or pasture land, it is waste. Bac. Ab. Waste, C. 1. The reasons given are, that it changes the course of husbandry, and the evidence of the estate. But these reasons are not applicable in this Commonwealth, and consequently such changes here do not constitute waste, unless such changes are prejudicial to the inheritance. So the doctrine

is laid down by Mr. Dane, and it is, we think, supported on satisfactory reasons. 3 Dane Ab. 219. When our ancestors emigrated to this country, they brought with them, and were afterwards governed by, the common law of England; excepting, however, such parts as were inapplicable to their new condition. 2 Mass. 534; 8 Pick. 316. That the principle of the common law under consideration was then inapplicable to the condition of the country is obvious; nor has it been applicable at any time since; for it has been the constant usage of our farmers to break up their grass lands for the purpose of raising crops by tillage, and laying them down again to grass, and otherwise to change the use and cultivation of their lands, as occasions have required. A conformity therefore, to this usage, cannot be deemed waste. Even in England, "if a meadow be sometimes arable, and sometimes meadow, and sometimes pasture, the ploughing of it is not waste." Bac. Ab. Waste, C. 1; Com. Dig. Wast, D. 4. As to the effect of such changes upon the evidence of title to lands, it is evident that it can have none in this State. Our conveyances are very simple. The land conveyed is described by metes and bounds, or by some general and certain description of its limits without any designation of the kind of land conveyed, whether it be arable land or grass land, wood land or cleared land, pasture or meadow.

As to the other acts complained of, we think they cannot be deemed waste, unless they may be prejudicial to the plaintiff; and that the instructions to the jury, in this respect, were therefore correct. To erect a new house on the land where there was not any before, is not waste. Bac. Ab. Waste, C. 5. So there seems no authority for holding that the opening of a way by the defendant, for his convenience, and draining the land, are acts of waste. And as to raising the land, by carrying thereon quantities of earth, whatever may be the law of England, it is not in this Commonwealth waste, unless it may be prejudicial to the plaintiff.

The ancient doctrine of waste, if universally adopted in this country, would greatly impede the progress of improvement, without any compensating benefit. To be beneficial, therefore, the rules of law must be accommodated to the situation of the country, and the course of affairs here; as it has been frequently decided. *Winship v. Pitts*, 3 Paige, 259, and other cases cited by the defendant's counsel.

In this country, it is difficult to imagine any exception to the general rule of law, that no act of a tenant will amount to waste, unless it is or may be prejudicial to the inheritance, or to those entitled to the reversion or remainder.

For these reasons, we are of opinion that the instructions to the jury were correct.

*Judgment on the verdict.*¹

¹ "More serious than these was his act in voluntarily permitting a large body of the woodland to become forfeited to the State for unpaid taxes. That the land forfeited was unproductive, that there remained belonging to the estate sufficient wood to supply its wants indefinitely, that the land had been overvalued by the as-

MOORE v. TOWNSHEND.

SUPREME COURT OF NEW JERSEY. 1869.

[Reported 4 Vroom, 284.]

THIS was an action on the case in the nature of waste to recover damages for permissive waste, tried at the Cumberland Circuit. The plaintiff, on the 5th of November, 1853, by a lease, under seal, demised to the defendant the premises known as the Eagle Glass Works, in the county of Cumberland, together with one hundred and fifty moulds, and all the tools of every description connected with the glass manufactory business at that manufactory; to hold for the term of two years and eight months, at a yearly rent of one thousand dollars. The lease contained a covenant, by the tenant, for the re-delivery of the moulds and tools, to the lessor, at the expiration of the term, in as good condition as they were in at the time of the demise, reasonable wear and tear and fire excepted. It also contained the following clause: "It being understood and agreed between the said parties that said Moore has the privilege of laying out one hundred dollars per year in repairs on said property, and deducting the same from the rent." There was no other covenant in the lease on the subject of repairs. It was shown, at the trial, that twenty-one dollars and fifty cents had been expended in repairs during the continuance of the lease, of which sum six dollars and ninety-five cents had been deducted from the rent, the balance of which had been paid.

The jury found a verdict for the plaintiff, and assessed his damages at five hundred and fifty dollars.

essor, and that the defendant had tried in vain to have the valuation reduced, and that the board of supervisors in making the levy of county taxes had exceeded the limits of their authority, afford no excuse for his action. He took the estate as a whole, and was bound so to preserve it. He cannot segregate the profitable from the unprofitable, nor the sterile from the fertile, by preserving the one at the sacrifice of the other. The taxes were his individual debt, and the fact that they constituted a lien on both his own interests and that of the remainder-men made it his duty to keep them down. . . . These acts of voluntary waste call for relief. The defendant should be required, within such time as the Chancellor may deem reasonable, to redeem or repurchase the forfeited lands, and upon his failure so to do a commissioner should be appointed to sequester the rents, or so much of them as may be necessary for this purpose. For the purpose of redeeming the lands and of hereafter keeping down the taxes the defendant will be permitted to fell timber in such quantities and at such places as do not seriously impair the value of the inheritance. As tenant for life he has the right to do this, even for purposes of profit." CHALMERS, C. J., in *Cannon v. Barry*, 59 Miss. 289, 304. And so *Stetson v. Day*, 51 Me. 434.

"We have been referred to no case in which it has been decided that the neglect of the life tenant to insure is to be regarded as in the nature of voluntary or permissive waste, though it has been held that the failure to pay taxes is; *Stetson v. Day*, 51 Me. 434; but that manifestly stands upon different ground." MARTON, J., in *Harri-son v. Pepper*, 166 Mass. 288, 289.

A rule to show cause why a new trial should not be granted, was allowed; and the following reasons were assigned for setting aside the verdict. 1. Because an action on the case will not lie against a tenant for years for permissive waste. 2. Because the lease between the parties measures and limits the liability of the tenant, in the matter of repairs.

Argued at November Term, 1868, before the CHIEF JUSTICE and Justices DALRIMPLE and DEFUE.

For the rule, *J. T. Nixon* and the Attorney-General, *George M. Robeson*.

Against the rule, *F. F. Westcott* and *Mr. Browning*.

DEFUE, J. The action on the case, in the nature of waste, has almost entirely superseded the common law action of waste, as well for permissive as for voluntary waste, as furnishing a more easy and expeditious remedy than a writ of waste. It is also an action encouraged by the courts, the recovery being confined to single damages, and not being accompanied by a forfeiture of the place wasted.

At common law, waste lay against a tenant in dower, tenant by the curtesy and guardian in chivalry, but not against lessees for life or years. 2 Inst. 299, 305; Co. Lit. 54. The reason of this diversity was, that the estates and interests of the former were created by the law, and therefore the law gave a remedy against them, but the latter came in by the act of the owner who might have provided in his demise against the doing of waste by his lessee, and if he did not, it was his negligence and default. 2 Inst. 299; Doct. & Stu., ch. 1, p. 102. This doctrine was found extremely inconvenient, as tenants took advantage of the ignorance of their landlords, and committed acts of waste with impunity. To remedy this inconvenience the Statute of Marlbridge (52 Hen. 3, ch. 23) was passed. But as the recompense given by this statute was frequently inadequate to the loss sustained, the Statute of Gloucester (6 Edw. 1, ch. 5) increased the punishment by enacting that the place wasted should be recovered, together with treble damages. 1 Cruise Dig. 119, §§ 25, 26; *Sackett v. Sackett*, 8 Pick. p. 313, per Parker, C. J. The Statute of Marlbridge is in the following words: "Also fermors, during their terms, shall not make waste, sale, nor exile of house, woods, and men, nor of anything belonging to the tenements that they have to ferm, without special license had by writing of covenant, making mention that they may do it; which thing, if they do and thereof be convict, they shall yield full damage, and shall be punished by amercement grievously." 2 Inst. 145. The word "*fermor*" (*firmarii*) in this statute comprehended all such as held by lease for life or lives, or for years, by deed or without deed (2 Inst. 145, note 1), and also devisees for life or years (2 Roll. Abr. 826, l. 35). By the Statute of Gloucester, "it is provided, also, that a man, from henceforth, shall have a writ of waste, in the Chancery, against him that holdeth by law of England or otherwise, for term of life, or for term of years, or a woman in dower. And he which shall be attainted of

waste, shall lease the thing that he hath wasted, and, moreover, shall recompense thrice so much as the waste shall be taxed at. And for waste made in the time of wardship, it shall be done as is contained in the Great Charter." 2 Inst. 299. At the common law, a tenant at will was punishable for voluntary waste, but not for permissive waste. *Countess of Salop v. Crompton*, Cro. Eliz. 777, 784; *The Countess of Shrewsbury's Case*, 5 Rep. 14; *Harnett and Wife v. Maitland*, 16 M. & W. 258. Tenants in dower, by the curtesy, for life or lives, and for years, were included in the Statute of Gloucester. Tenants at will were always considered as omitted from the Statute of Marlbridge as well as from the Statute of Gloucester, and, therefore, continued to be dispunishable for mere permissive waste, and punishable for voluntary waste by action of trespass as at common law. The reason of this exemption of tenants at will from liability for permissive waste, was the uncertain nature of their tenure, which would make it a hardship to compel them to go to any expense for repairs. Their exemption from the highly remedial process of waste provided by the Statute of Gloucester, is attributable to the fact that the owner of the inheritance might at any time, by entry, determine the estate of the tenant, and thus protect the inheritance from spoil or destruction.

The language of the Statute of Marlbridge is, "shall not make (*non facient*) waste," and in the Statute of Gloucester, in speaking of guardians, the words used are, "he which did waste" (*que aver fuit waste*). The settled construction of these statutes in the English law until a comparatively recent period was, that they included permissive waste as well as voluntary waste. In a note in exposition of the Statute of Marlbridge, Lord Coke, in commenting on the words "*non facient*," says: "To do or make waste, in legal understanding in this place, includes as well permissive waste, which is waste by reason of omission or not doing as for want of reparation, as waste by reason of commission, as to cut down timber, trees, or prostrate houses, or the like; and the same word hath the Statute of Gloucester, ch. 5, *que aver fuit waste*, and yet is understood as well of passive as active waste, for he that suffereth a house to decay which he ought to repair, doth the waste." 2 Inst. 145; 7 Bac. Abr. 250; 3 Bl. Com. 225; 2 Saund. 252; 4 Kent, 76. So under the prohibition to do waste, the tenant is held to be bounden for the waste of a stranger, though he assented not to the doing of waste. Doct. & Stu., ch. 4, p. 113; 2 Inst. 303; *Fay v. Brewer*, 3 Pick. 203; 1 Washburn, R. Prop. 116. It is common learning that every lessee of land, whether for life or years, is liable in an action of waste to his lessor, for all waste done on the land in lease by whomsoever it may be committed, *per* Heath, J., in *Attersoll v. Stevens*, 1 Taunt. 198; with the exception of the acts of God, public enemies, and the acts of the lessor himself. *White v. Wagner*, 4 Harr. & Johns. 373; 4 Kent, 77; *Heydon and Smith's Case*, 13 Coke, 69. The instances in the earlier reports in which lessees for life or years were held liable for permissive waste, which consisted in injuries re-

sulting from acts of negligence or omission, are quite frequent; and their liability is grounded, not on the covenants or agreements in the instruments of demise, but on the statute, which subjected them to the action of waste. *Griffith's Case*, Moore, 69, No. 187; *Ib.* 62, No. 173; *Ib.* 73, No. 200; *Keilway*, 206; *Darcy v. Askwith*, Hobart, 234; *Glover v. Pipe*, Owen, 92; 3 *Dyer*, 281; 2 *Roll. Abr.* 816 l. 40; 22 *Vin. Abr. Waste*, "c" and "d," pp. 436-440, 443; *Co. Lit.* 52 a, 53 b; 5 *Com. Dig. Waste*, d 2, d 4; *Bissett on Estates*, 299, 300. So uniformly had the courts determined that lessees for life or years had committed waste by the application of the common law rules, with respect to waste, whether of omission or commission, that the learned commentator on English law says, "that for above five hundred years past, all tenants merely for life, or for any less estate, have been punishable or liable to be impeached for waste, both voluntary and permissive; unless their leases be made, as sometimes they are, without impeachment of waste." 2 *Bl. Com.* 283.

This construction of the Statutes of Marlbridge and Gloucester continued to be received without dissent until the decision of the case of *Gibson v. Wells*, 4 B. & P. 290, in the year 1805, which was followed by the case of *Herne v. Bembow*, 4 Taunt. 764 (1813). These cases, it is insisted, have settled the construction against the liability of a tenant for years for permissive waste. *Gibson v. Wells* is not an authority for this position. The tenant against whom the action there was brought was a tenant at will, who is not included within the statutes, and who, at common law, was punishable for voluntary, but not for permissive waste. In *Herne v. Bembow* it does not clearly appear that the lease was for a term. It is certain that the opinion of the court proceeded upon the principles applicable to tenants at will. As the case is reported in Taunton, it appears to have been decided, without argument or consideration. The opinion is a *per Curiam* opinion, and the only case cited is *The Countess of Shrewsbury's Case*, 5 Co. 14, which was a case of a tenancy at will.

The only subsequent case which sustains these cases is *Torriano v. Young*, 6 C. & P. 8; a case at Nisi Prius. In other cases where *Herne v. Bembow* was cited, the English courts show no disposition to follow it. In *Jones v. Hill*, 7 Taunt. 392, Gibbs, C. J., expressly guards himself against being supposed to concur in the position that an action will not lie against a lessee for years for permissive waste. In *Martin v. Gilham*, 7 A. & E. 540, and in *Beale v. Sanders*, 3 Bing. N. C. 850, a decision of that question is avoided; and in *Harnett v. Maitland*, 16 M. & W. 256, 261, Parke, B., on *Gibson v. Wells*, *Herne v. Bembow*, and *Torriano v. Young* being cited, intimates an opinion against those cases as necessarily involving the result that a tenant for life is also punishable for permissive waste. Text-writers of acknowledged authority have not recognized these cases as settling the law against the older cases and the opinions of Coke and Blackstone, but have regarded them as merely throwing a doubt upon a principle that had

previously been set at rest. 2 Saund. 252 b, note i; Arch. L. & T. 196, 7; Smith on L. & T. 196; Comyn on L. & T. 495, and note e; 2 Bouvier's Law Dict. 645, Waste, § 14; 1 Washburn on R. Prop. 124, and note 1. By other legal writers they are doubted or condemned as unsound in principle. Roscoe on Real Actions, 385; Ferrard on Fixtures, 278, 281, note; 1 Evans' Statutes, 193, note; Broom on Parties, 257; 4 Kent, 76, 79; Elmes on Dilapidations, 257.

Independent of authority, the true construction of the Statute of Gloucester, leads to the conclusion that tenant for life or years was made liable for permissive as well as voluntary waste. Before either this Act or the Statute of Marlbridge was passed, waste was recognized in the law, as an injury to the inheritance, resulting either from acts of commission or of omission. Neither of these Statutes created new kinds of waste, but gave a new remedy for old wastes, leaving what was waste, and what not, to be determined by the common law (2 Inst. 300); and by the Statute of Gloucester the writ of waste was suable out of Chancery as well against lessees for life or years, as against tenant by the curtesy, or in dower, putting the former, as to the newly created remedy, on the same footing as the latter. "It hath been used as an ancient maxim in the law, that tenant by the curtesy, and the tenant in dower, should take the land with this charge, that is to say, that they should do no waste themselves, nor suffer none to be done; and when an action of waste was given after, against a tenant for term of life, then he was taken to be in the same case, as to the point of waste, as tenant by the curtesy, and tenant in dower was, that is to say, that he should do no waste, nor suffer none to be done." Doct. & Stu., ch. 4, p. 113. No distinction can be made between lessee for life and lessee for years. Both are mentioned in the Statute conjointly; and each derives his interest in the premises from the act of the owner of the inheritance.

The second section of the act for the prevention of waste, which is in force in this State (Nix. Dig., 4th ed., 1022) provides that no tenant for life or years, or for any other term, shall during the term *make* or *suffer* any waste, sale or destruction of houses, gardens, orchards, lands, or woods, or anything belonging to the tenements demised, without special license in writing, making mention that he may do it. The third section is in substance the same as the Statute of Gloucester. The Act was passed in 1795. The use of the words "*make or suffer*," in the second section, which are equivalent to Coke's interpretation of *fucent* in the Statute of Marlbridge, manifests an intent to adopt as the law of this State, the doctrine of the English courts, as to the liability of tenants for life or years for permissive waste, which was universally received at the time of the passage of the Act.

The second reason assigned involves the effect of the lease in this action.

Premising that the act or omission, to constitute waste must be either an invasion of the lord's property, or at least be some act or neglect

which tends, materially, to deteriorate the tenement, or to destroy the evidence of its identity (Burton's Comp. R. Prop. 411; *Doe ex dem. Grubb v. Earl of Burlington*, 5 B. & Ad. 507; 2 Saund. 259 a, note o; *Pynchon v. Stearns*, 11 Met. 304; 1 Washburn R. Prop. 108); and that the action is founded partly upon the common law and partly upon the Statute, and does not depend for its support on any covenants of the tenants (22 Viner, Abr. 467, Waste M. 4; 3 Bl. Com. 227; *Kinlyside v. Thornton*, 2 W. Black. 1111; *Marker v. Kenrick*, 13 C. B. 188); it is obvious that we must resort to the Statute for the conditions on which the tenant is excusable for the waste done.

There is a class of cases in which tenants have been held not to be liable for waste resulting from non-repair where the lessor has entered into a covenant to make the repairs for the want of which the injury has happened. These cases go upon the ground that the injury was caused by the lessor's own default, on which he can base no right to recover. There is no such covenant in the lease now under consideration.

The Statute forbids waste by the tenant "without special license, in writing, making mention that he may do it." The consent of the landlord by parol will not be sufficient authority. *McGregor v. Brown*, 6 Seld. 114. The words usually employed for this purpose are "without impeachment of waste," but any words of equivalent import will be sufficient, provided they amount to a license to do the acts. The defendant, to bring himself within the Statute, relies on that part of the lease which relates to the re-delivery of the personal property leased, in connection with the stipulation giving the defendant the privilege of expending a portion of the rent in each year for repairs. The covenant as to the personal property is entirely distinct from the obligations of the tenant, with respect to the real estate. The privilege of expending a portion of the rent reserved in repairs, is not a license to the tenant to omit a duty put upon him by the Statute, growing out of the relations between the parties. To construe a privilege given by the landlord to expend his money in the reparation of the demised premises, as a license to the tenant to omit his duty, to the spoil or destruction of the inheritance, would be an entire subversion of the obvious intent of the landlord. If it falls short of a license for the act complained of, it does qualify or abridge the obligations of the tenant which exist independent of the provisions of the lease.

It was further insisted that if an action lies, it should be an action *ex contractu*, and not in *tort*. As already observed, the gravamen of the action is the breach of a statutory duty. An action on the case founded in *tort* will lie for the breach of a duty though it be such as that the law will imply a promise on which an action *ex contractu* may be maintained. *Brunell v. Lynch*, 5 B. & C. 589. To the same effect are the cases of *Kinlyside v. Thornton* and *Marker v. Kenrick*, already cited, in which it was held that an action on the case in the nature of

waste, will lie, although the act complained of might also be the subject of an action for the breach of an express covenant.

BEASLEY, C. J., and DALRIMPLE, J., concurred.

*Rule discharged.*¹

SAMPSON v. GROGAN.

SUPREME COURT OF RHODE ISLAND. 1899.

[*Reported 21 R. I. 174.*]

ASSUMPSIT for the value of a dwelling-house destroyed by accidental fire during the life tenancy of the defendant's testatrix. Certified from the Common Pleas Division, and heard on demurrer to the declaration.

TILLINGHAST, J. This is an action of assumpsit, and is brought to recover the sum of three thousand dollars, alleged to be the value of a dwelling-house which was destroyed by fire during the time it was held by the defendant's testatrix, as life tenant thereof under the will of Bernard O'Connell. The devise in said will to defendant's testatrix is as follows:

"Second. I give and devise to my affectionate and beloved wife Margaret O'Connell my house and lot in the village of Wickford in the town of North Kingstown with all the privileges and appurtenances thereto belonging for and during her natural life, she to keep the same in repair; at her decease, I give and devise said house and lot to my niece Julia O'Connell to her, her heirs and assigns forever."

The declaration alleges that, immediately upon the death of said Bernard O'Connell, the said Margaret O'Connell, afterwards Margaret Grogan, elected and decided to accept said devise and entered into possession of said real estate and a house then thereon standing of the value of \$2,000, and thereby assumed upon herself the obligation to keep said house in repair, and so promised to keep said house in repair during her tenancy, to wit, during the continuance of her natural life. It then avers that, while thus in possession of the premises, the house situated thereon was wholly destroyed by fire, and that it was the duty of said Margaret Grogan, under the terms of said devise and of her promise made upon accepting the same, to rebuild said house, which she failed to do, notwithstanding the fact that she received the insurance money for the insurance which was upon said house when it was burned, whereby the plaintiff Julia Sampson, being the owner of the estate in remainder created by said devise, was damaged in the sum of \$3,000, and has become entitled to have and recover the same of the defendant executor. Sylvester Grogan having deceased since the com-

¹ For statutory provisions concerning the remedy for waste, see Stimson, Am. Stat. Law, § 1353.

mencement of this action, John H. Bagley, his administrator, has assumed the defence thereof.

The defendant demurs to the declaration, on the ground that, as a matter of law, it was not the duty of said Margaret Grogan, under the terms of said devise, to rebuild said house.

We agree with the plaintiff's counsel that the action cannot be regarded as an action of waste or for damages under the statute (Gen. Laws R. I. cap. 268, § 1¹), but that it is based entirely upon the agreement of the life tenant to repair, created by the devise and the life tenant's acceptance thereof. So that the case turns upon the legal effect to be given to the language of said devise. But while this is so, yet as the plaintiff's counsel, both in his elaborate brief and also at the bar, has carefully discussed the law of waste, and as the principles thereof are closely related to the main question involved, we will consider it.

The plaintiff's counsel argues that, even conceding that an action for waste under the statute (Gen. Laws R. I. cap. 268) cannot be maintained, because the injury to the disherison was caused by accidental fire, yet that the life tenant is liable for all waste. That the statute of this State is like the English Statute of Marlbridge in defining the liability, and like that of Gloucester in declaring a forfeiture and giving a double penalty.

By the ancient common law, not only might he that was seized of an estate of inheritance do as he pleased with it, but also waste was not punishable in any tenant save only in three persons, namely, guardian in chivalry, tenant in dower, and tenant by the curtesy; and not in tenant for life or years. 4 Coke's Inst. 299. The reason of the diversity, as stated by Blackstone, was that the estate of the first three above named was created by the act of the law itself, which, therefore, gave a remedy against them; but tenant for life or for years came in by the demise and lease of the owner of the fee, and therefore he might have provided against the committing of waste by his lessee; and if he did not, it was his own fault. Cool. Black. Book 2, p. 282; Tiedeman on Real Prop. § 72; 4 Kent, 12th ed. *80; *Countess of Shrewsbury's Case*, 5 Co. 13. Subsequently, in favor of the owners of the inheritance, the statute 52 Hen. 3, c. 23, known as the Statute of Marlbridge, was passed in A. D. 1267, § 2 of which provides as follows: "Also fermors, during their terms shall not make waste, sale nor exile of house, woods, and men, nor of anything belonging to the tenements that they have to ferm, without special license had by writing of covenant, making mention that they may do it; which thing, if

¹ Said section is as follows: "Every person seized of any real estate for the term of his own life, or for the life or lives of any other person or persons, or as a tenant for years, who shall commit or suffer any waste on such estate, shall forfeit his estate in the place so wasted and double the amount of the waste so done or suffered, to be recovered in an action of waste by the person entitled to the next estate in remainder or reversion in the place so wasted." — Ed.

they do, and thereof be convict, they shall yield full damage and shall be punished by amerciamment grievously." Under this statute the disability of committing waste was made an ordinary and general incident to all kinds of estates for life and for years (Tiedeman, *supra*), and the actual damages sustained by the reversioner were recovered in an action of waste. 1 Wash. Real Prop. 5th ed. 158. Under the common law, as thus modified by the Statute of Marlbridge, only single damages were recoverable by way of punishment for waste, except in the case of a guardian, who also forfeited his wardship by virtue of the great charter. See Stat. 9 Hen. 3, c. 4; 1 Black. *supra*, 283.

Thus the law remained until the passage of the statute of 6 Edw. 1, c. 5, in A. D. 1278, known as the Statute of Gloucester, which provides: That a man from henceforth shall have a writ of waste in the Chancery against him that holdeth by law of England, or otherwise for term of life or for term of years, or a woman in dower; and he which shall be attained of waste shall lose the thing that he hath wasted, and moreover shall recompense thrice so much as the waste shall be taxed at." Our statute of waste above referred to is based upon the one last quoted. Under the law as it stood after the passage of the Statute of Gloucester, not only tenants by the curtesy and in dower were held responsible for accidental fires at the common law, but tenants for life and years, created by the act of the parties, were also held responsible therefor as for *permissive waste*, under the last named statute. 4 Kent, *supra*, § 82. Under the language of this statute that "*he shall lose the thing that he hath wasted*," "it hath been determined," says Blackstone, "that the place is included. That if the waste be done *sparsim*, or here and there all over a wood, the whole wood shall be recovered, or if in several rooms of a house, the whole house shall be forfeited; because it is impracticable for the reversioner to enjoy only the identical places wasted, when lying interspersed with the other." It was waste under said statute to pull down a house or to suffer it to decay. If it was uncovered or ruinous at the commencement of the term and the tenant suffered it to become more so; if he suffered the house to be burned by neglect or mischance; if it was uncovered by tempest and he suffered it afterwards to decay, or even if glass or windows were broken, he was liable for waste. In short, it seems that the only exception to the liability of the tenant for damages to the reversion was where the damage was caused by the acts of God and public enemies, and the acts of the reversioner himself. See Woodf. L. & T. 461 *et seq.*; 4 Co. 536.

"It is common learning," said Heath, J., in *Attersoll v. Stevens*, 1 Taunt. 198, "that every lessee of land, whether for life or years, is liable in an action of waste to his lessor for all waste done on the land in lease, by whomsoever it may be committed." Chambre, J., in the same case, p. 196, said: "The situation of the tenant is extremely analogous to that of a common carrier. To prevent collusion (and not on the presumption of actual collusion) both are charged with the

protection of the property intrusted to them against all but the acts of God and the King's enemies; and as the tenant in the one case is charged with the actual commission of the waste done by others, so, in the other case, the carrier is charged with actual default and negligence, though he loses the goods by a force that was irresistible, or by fraud, against which no ordinary degree of care and caution could have protected him." Lord Coke is not less explicit, for he says: "Tenant by the curtesy, tenant in dower, tenant for life, years, &c., shall answer for the waste done by a stranger, and shall take their remedy over." 1 Inst. 54 a; see also 2 id. 145, 303; 4 Kent's Com. 77; 1 Inst. 57 a, note 377; 3 Black. Com. 228; Comyn's Land. & Ten. 188; Prof. Gray's Select Cases on the Law of Property, Vol. 1, 560.

The law of waste, as thus briefly outlined, continued in force in England until the passage of the Statute of 6 Anne, c. 31, in A. D. 1707, which guarded the tenant from the consequences of accidental misfortune¹ in case of fire, by declaring that no suit should be had or maintained against any person in whose house or chamber any fire should accidentally begin, nor any recompense be made by such person for any damage suffered or occasioned thereby. Statutes at Large, 10 Will. 3, Queen Anne, Vol. 4, 314. This statute was afterwards enlarged by the Statute of 14 Geo. 3, c. 78, § 86, passed in 1774, so as to include stables, barns, or any other buildings on the estate. Statutes at Large (7 Geo. 3-18 Geo. 3, Vol. 8, 397. Speaking of the Statute of 6 Anne, Chancellor Kent says: "Until this statute, tenants by the curtesy and in dower were responsible, at common law, for accidental fires; and tenants for life and years, created by the act of the parties, were responsible, also, under the Statute of Gloucester, as for permissive waste." 4 Kent's Com. 82.

As to the question whether the action for permissive waste lies against a tenant for years, most of the authorities are collected in the notes to *Greene v. Cole*, 2 Saund. 252, where it is stated as clear law that, at common law, the action only lay against tenant by the curtesy, tenant in dower, or guardian, but that by the Statute of Gloucester, 6 Ed. 1, c. 5, the action is given against lessee for life or years, or tenant *pur auter vie*, or against the assignee or tenant for life or years for waste done after the assignment. *Harnett v. Maitland*, 16 M. & W. 261.

The first practical question raised by the argument of plaintiff's counsel, as aforesaid, is whether the law of waste as it existed in England after the passage of the Statute of Gloucester, and before the passage of the Stat. 6 of Anne (for the latter statute has never been in force in this State), is so far binding in this State as to hold a life tenant responsible for an accidental fire. We do not think the doctrine of permissive

¹ The expression "fire . . . shall accidentally begin," as used in the English statutes mentioned in this paragraph, was, in *Filliter v. Phippard*, 11 Q. B. 347, construed to mean "without negligence." A few American jurisdictions have adopted similar legislation; Stimson, Am. Stat. Law, §§ 2047, 2062. — Ed.

waste has ever been understood to extend so far as to include damages thus occasioned. The rule was adopted in England in very early times, and was then adapted to the doctrine which there prevailed regarding the almost sacred rights of land-owners under feudal tenures which had not then been abolished, and were not until the Stat. 12 Car. 2, c. 24, passed in A. D. 1660. But even in England, with all the inherited tendencies of the governing classes in favor of the feudal system, and the superior rights of the landed aristocracy, the law evidently came to be considered too rigid, as it was finally repealed, so far as the liability for accidental fires was concerned, by the aforesaid Statute of Anne. It is true that the Statute of Gloucester is one of the English statutes which was found to be in force in this State by the committee appointed by the General Assembly in October, 1748, to prepare a bill "for introducing into this Colony such statutes of England as are agreeable to the constitution" (5 R. I. Colonial Rec. 289; Acts and Laws of His Majesty's Colony of Rhode Island, 1745 to 1752, p. 70), and, as modified by our statute of waste, it is probably still in force. But we think it has never been considered that under our statute, which practically supersedes the Statute of Gloucester, a tenant for life or for years could be compelled to rebuild premises destroyed by accidental fire. See Dane's Abridgement, Vol. 3, 228-9; *Parker v. Chambliss*, 12 Ga. 235.

Speaking of permissive waste, Chancellor Kent says: "There does not appear to have been any question raised, and judicially decided in this country, respecting the tenant's responsibility for accidental fires, as coming under the head of this species of waste. I am not aware that the Statute of Anne has, except in one instance, been formally adopted in any of the States." (It has since been adopted in Wisconsin, and also in New York in regard to fires in woods and fallow land. See 1 Wash., *supra*, 156-7 and notes.) "It was intimated, upon the argument in the case of *White v. Wagner* (*post*), that the question had not been decided; and conflicting suggestions were made by counsel. Perhaps the universal silence in our courts upon the subject of any such responsibility of the tenant for accidental fires, is presumptive evidence that the doctrine of permissive waste has never been introduced and carried to that extent in the common law jurisprudence of the United States." Mr. Kerr, in his late work on Real Property, under the head of "Permissive Waste," says: "The tenant for life is answerable if the houses or other buildings on the premises are destroyed by fire from the negligence or carelessness of himself or his servants; and he must rebuild within a convenient time at his own expense. The life tenant is not liable, however, if the fire is the result of an accident, and he and his servants are free from fault." See also Hopkins on Real Prop., Hornbook Series, 62-3 and cases cited. Mr. Washburn, in his work on Real Property (5th ed. 157), states the law to be that if the fire occurs without the fault of the tenant, he would not be responsible.

Such seems to be the well-settled, if not, indeed, the unquestioned law in this country as to permissive waste. And it is certainly entirely consistent with right and reason. If a building is destroyed by fire through the carelessness or negligence of the tenant, or of his servants, which is the same thing, he is, and ought to be, responsible in damages therefor; for he is bound to the exercise of due care and diligence in the use of property the fee of which is in another. But he is not, and cannot in reason be held liable for damages caused by an accident, where he is entirely free from fault. See *Fay v. Brewer*, 3 Pick. 203; *Barnard v. Poor*, 21 Pick. 378; *Scott's Ex'x v. Scott*, 18 Gratt. at p. 165; *Clark v. Foot*, 8 Johns. 329; *Wade v. Malloy*, 16 Hun, 226; *Maull v. Wilson*, 2 Harr. 443; *Cornish v. Strutton*, 8 B. Mon. 586.

In *White v. McCann*, 1 Ir. C. L. 217, Blackburne, C. J., says: "There is no authority or position that the accidental destruction of premises amounts to permissive waste, or to a *tort* on the part of a tenant."

In *United States v. Bostwick*, 94 U. S. 53, it was held that, in the absence of an *express* covenant to repair, a tenant is not answerable for accidental damages, nor is he bound to rebuild if the buildings are accidentally destroyed by fire or otherwise.

The case of *Clemence v. Steere*, 1 R. I. 272, cited by plaintiff's counsel in support of his position, is in harmony with this doctrine. The language quoted from the opinion: "If the house was torn down after she left the premises, and neither by her direction or permission, she is responsible," although only a *dictum*, and used by way of illustration in charging the jury, implies that in case the tenant *negligently* leaves or abandons the premises, and the house is torn down by a stranger, the tenant is liable.

In the case of *White v. Wagner*, 4 H. & J. (Md.) 373, cited by plaintiff's counsel, the court held that a lessee was responsible where the house was destroyed by a mob, on the ground that as the lessee "*did of his own authority, without the consent of the plaintiff*," divert the house to a totally different and much more dangerous purpose, well aware of the risk which the property would thereby have to encounter, on principles of law and justice, as between himself and the plaintiff he becomes responsible." It will at once be seen that the decision of that case was based upon the misconduct of the tenant in diverting the house to an improper and unauthorized use, and, therefore, that it is not an authority in support of the broad doctrine contended for by the plaintiff's counsel. Indeed, it is fair to infer, from certain language used by the court, that if the defendant had continued to use the house for the purposes for which it was left, and it had been destroyed by a mob, the defendant would not have been held liable. Moreover, the decision, even on the ground upon which it was put, was by a divided court.

Finally, then, as to the plaintiff's contention aforesaid regarding the

liability of the life tenant simply as such, without reference to the language of the devise in question, we are of opinion that it is untenable.¹

We now come to the plaintiff's main contention, which is that the acceptance of the devise by the life tenant imposed upon her the liability to repair to the same extent as though she had accepted a lease of the premises containing an absolute covenant to repair. The defendant's contention, on the contrary, is that the language of the devise relied on by plaintiff adds nothing to the obligation of the life tenant to keep up the estate and commit no waste, and that the only promise that can properly be implied is the promise which is to be implied on the part of every life tenant, namely, that no waste shall be committed. This he concedes was clearly the duty of the life tenant, being made so by Gen. Laws R. I. cap. 268, wherein the method of recovery for such violation is prescribed to be an action of waste.

[This point also was decided in favor of defendant. The remainder of the opinion, discussing this point and a question concerning the disposition of the insurance money, is omitted.]

Demurrer sustained.

B. Remedies.

I. AT LAW.

See *St. Marlebridge and St. Gloucester*, *ante*, p. 629.

Co. LIT. 53 b. No person shall have an action of waste, unless he hath the immediate state of inheritance.

Co. LIT. 54 a. If a lease be made to A. for life, the remainder to B. for life, the remainder to C. in fee, in this case, where it is said in the Register, and in F. N. B., that an action of waste doth lie, it is to be understood after the death or surrender of B. in the mean remainder, for during his life no action of waste doth lie.

But if a lease for life be made, the remainder for years, the remainder in fee, an action doth lie presently during the term in remainder, for the mean term for years is no impediment.

¹ In *Cook v. Champlain Transportation Co.*, 1 Denio, 91, the plaintiffs, assignees of a lessee for years, brought an action against a steamship company for carelessly setting fire to a mill on the demised premises by sparks from a steamboat. The lease provided that the buildings erected on the premises after the making of the lease (which was the case with the mill), should, "without damages of any kind, other than the natural wear of the same, revert to and become the property of the lessors." The court held that the plaintiffs were entitled to recover the full value of the building, placing its decision on the ground that the destruction of the mill was waste for which the plaintiffs, as tenants for term of years, were answerable to the reversioner irrespective of any express agreement.

On the same principle a tenant in dower has been allowed to recover against a stranger for cutting trees. *Willey v. Laraway*, 64 Vt. 559.

And, *nota*, reader, upon this Statute of Marlebridge lies a prohibition of waste against the lessee for life, and lessee for years, to prohibit them that they shall not do waste before any waste was done, as it was against tenant in dower, and tenant by the curtesy at common law. — *Bowles's Case*, *ante*, p. 636.

But this action [of waste] is now very seldom brought,¹ and has given way to a much more expeditious and easy remedy by *an action on the case in the nature of waste*. The plaintiff derives the same benefit from it, as from an action of waste in the *tenuit*, where the term is expired, and he has got possession of his estate, and consequently can only recover damages for the waste; and though the plaintiff cannot in an action on the case recover the place wasted, where the tenant is still in possession, as he may do in an action of waste in *tenet*, yet this latter action was found by experience to be so imperfect and defective a mode of recovering seisin of the place wasted, that the plaintiff obtained little or no advantage from it; and therefore where the demise was by deed, care was taken to give the lessor a power of re-entry, in case the lessee committed any waste or destruction; and an action on the case was then found to be much better adapted for the recovery of mere damages than an action of waste in the *tenuit*. It has also this further advantage over an action of waste, that it may be brought by him in the reversion or remainder for *life* or *years* as well as in fee, or in tail.² — 2 Wms. Saunds. 252, note 7 to *Greene v. Cole*.

II. IN EQUITY.

WHITFIELD v. BEWIT.

CHANCERY. BEFORE LORD MACCLESFIELD, C. 1724.

[Reported 2 P. Wms. 240.]

ONE seised in fee of lands in which there were mines, all of them unopened, by deed conveyed those lands and all mines, waters, trees,

¹ It was abolished by Stat. 3 & 4 W. 4, c. 27, s. 36.

² To sustain the action of waste, it seems to have been necessary that the privity of estate existing at the time when the waste was committed should continue in existence at the time of action brought. Co. Lit. 53 b; (but see *Robinson v. Wheeler*, 25 N. Y. 252). But there is no such limitation on the action on the case for waste; that action may be brought by the landlord, after alienation of his reversion, for waste committed before the alienation. *Dickinson v. Mayor of Baltimore*, 48 Md. 583. But see *contra*, *dictum* of Patteson, J., in *Bacon v. Smith*, 1 Q. B. 345, 349.

An action on the case by the landlord lies against a stranger who injures the inheritance; the common-law action of waste would not lie in such circumstances. "The remedy in this action [on the case in the nature of waste] is co-extensive with the liability to injury, whether from the tenant or a stranger." *Chase v. Hazelton*, 7 N. H. 171, 176.

A contingent remainder-man cannot maintain an action on the case in the nature of waste. *Hunt v. Hall*, 37 Me. 363. See *Bacon v. Smith*, *ubi sup*.

&c. to trustees and their heirs, to the use of the grantor for life (who soon after died), remainder to the use of A. for life, remainder to his first, &c. son in tail male successively, remainder to B. for life, remainder to his first, &c. son in tail male successively, remainder to his two sisters C. and D. and the heirs of their bodies, remainder to the grantor in fee.

A. and B. had no sons, and C. one of the sisters died without issue, by which the heir of the grantor, as to one moiety of the premises, had the first estate of inheritance.

A. having cut down timber sold it and threatened to open the mines; the heir of the grantor being seised of one moiety *ut supra* by the death of one of the sisters without issue, brought this bill for an account of the moiety of the timber and to stay A.'s opening of any mine.

1st Obj. As to the plaintiff's claim of the moiety of the moneys arising by sale of the timber, in regard the plaintiff comes into equity for the same, it would be more agreeable to the rules of equity, that the moneys produced by the timber should be brought into court and put out for the benefit of the sons as yet unborn and which may be born. That these contingent remainders being *in gremio legis* and under the protection of the law, it would be most reasonable that the moneys should be secured for the use of the sons when there should be any born; but as soon as it became impossible there should be a son, then a moiety to be paid to the plaintiff; and the case would be the same if there were a son *in ventre sa mere*; or the plaintiff might bring trover, and then what reason had he to come into equity?

CUR.: The right to this timber belongs to those who at the time of its being severed from the freehold were seised of the first estate of inheritance, and the property becomes vested in them.

As to the objection that trover will lie at law, it may be very necessary for the party who has the inheritance to bring his bill in this court, because it may be impossible for him to discover the value of the timber, it being in the possession of, and cut down by the tenant for life. This was the very case of the *Duke of Newcastle* versus *Mr. Vane*, where at Welbeck (the duke's seat in Nottinghamshire) great quantities of timber were blown down in a storm; and though there were several tenants for life, remainder to their first and every other son in tail, yet these having no sons born, the timber was decreed to belong to the first remainder-man in tail.

Neither do I think the defendant ought (as he insists) to be allowed out of this timber what money he has laid out in timber for repairs, since it was a wrong thing to cut down and sell the same, and shows *quo animo* it was done, not to repair but to sell.

2dly, it was urged, that the mines being expressly granted by this settlement with the lands, it was as strong a case as if the mines themselves were limited to A. for life, and like *Saunders's Case* in 5 Co. 12, where it is resolved, that on a lease made of land together with the

mines, if there be no mines open, the lessee may open them ; so in this case, there being no mines open, the *cestui que use* for life might open them.

BUT LORD CHANCELLOR, *contra*. A. having only an estate for life subject to waste, he shall no more open a mine than he shall cut down the timber-trees, for both are equally granted by this deed ; and the meaning of inserting mines, trees, and water, was, that all should pass, but as the timber and mines were part of the inheritance, no one should have power over them but such as had an estate of inheritance limited to him.

Of which opinion was Lord Chancellor King on a rehearing.

BEWICK v. WHITFIELD.

CHANCERY. BEFORE LORD TALBOT, C. 1734.

[Reported 3 P. Wms. 267.]

A. WAS tenant for life, remainder to B. in tail, as to one moiety, remainder as to the other moiety to C. an infant in tail, remainder over. There was timber upon the premises greatly decaying ; whereupon B. the remainder-man, brought a bill, praying, that the timber that was decaying might be cut down, and that the plaintiff the remainder-man in tail, together with the other remainder-man, the infant, might have the money arising by the sale of this timber. On the other hand, the tenant for life insisted to have some share of this money.

LORD CHANCELLOR. The timber, while standing, is part of the inheritance ; but whenever it is severed, either by the act of God, as by tempest, or by a trespasser and by wrong, it belongs to him who has the first estate of inheritance, whether in fee or in tail, who may bring trover for it ; and this was so decreed upon occasion of the great windfall of timber on the Cavendish estate.¹

¹ BATEMAN v. HOTCHKIN.

CHANCERY. BEFORE LORD ROMILLY, M. R. 1862.

[Reported 31 Beav. 486.]

A QUESTION AROSE as to the right of a tenant for life impeachable for waste to a fund derived partly from wood blown down by a storm.

The question was brought before the Master of the Rolls in Chambers, who gave the following opinion in writing : —

“That in the case of waste committed by a tenant for life by cutting timber, the produce of the sale of it is part of the inheritance, and as the tenant for life can gain no advantage by his own wrongful act, the produce is invested and accumulated for the benefit of the first estate of inheritance.

In the case of timber blown down by a storm, there is no waste, because it is the act of God, but the produce of the sale of it belongs to the inheritance, that is, the money must be invested in Consols, and the interest paid to the tenant for life.”

2dly. As to the tenant for life, he ought not to have any share of the money arising by the sale of this timber; but since he has a right to what may be sufficient for repairs and botes, care must be taken to leave enough upon the estate for that purpose; and whatever damage is done to the tenant for life on the premises by him held for life, the same ought to be made good to him.

3dly. With regard to the timber plainly decaying, it is for the benefit of the persons entitled to the inheritance, that it should be cut down, otherwise it would become of no value; but this shall be done with the approbation of the Master; and trees, though decaying, if for the defence and shelter of the house, or for ornament, shall not be cut down. B. that is the tenant in tail (and of age), of one moiety, is to have a moiety of the clear money subject to such deductions as aforesaid, the other moiety belonging to the infant, must be put out, for the benefit of the infant. on government or real securities, to be approved of by the Master.

LORD CASTLEMAIN v. LORD CRAVEN.

CHANCERY. BEFORE VERNEY, M. R. 1733.

[Reported 22 Vin. Ab. 523, pl. 11.]

A. TENANT for life, remainder to trustees to preserve, &c. remainder to C. the plaintiff in tail, remainder over, with power for A. with consent of trustees to fell timber, and the money arising to be invested in lands, &c. to same uses, &c. A. felled timber to the value of £3,000 without consent of trustees, who never intermeddled, and A. had suffered some of the houses to go out of repair. C. by bill prayed an account and injunction. The MASTER OF THE ROLLS said, that the timber may be considered under 2 denominations, (to wit) such as was thriving, and not fit to be felled; and such as was unthriving, and what a prudent man and a good husband would fell, &c. And ordered the Master to take an account, &c. and the value of the former which was waste and therefore belongs to the plaintiff, who is next in remainder of the inheritance, is to go to the plaintiff, and the value of the other is to be laid out according to the settlement, &c. But as to repairs, the court never interposes in case of permissive waste either to prohibit or

Mr. Speed, for the plaintiff.

Mr. C. Hall, for the tenant for life.

THE MASTER OF THE ROLLS. I am of opinion that the tenant for life is entitled to have the benefit of the sale of all such trees felled by the wind as he would be entitled to cut himself, and to all fair and proper thinnings, and to all coppices cut periodically in the nature of crops.

There must be an inquiry to ascertain what part of the fund is derived from timber or cuttings within that description.

See *Harrison's Trusts*, 28 Ch. D. 220; *Stonebraker v. Zollickoffer*, 52 Md. 154.

give satisfaction, as it does in case of wilful waste; and where the court having jurisdiction of the principal, viz. the prohibiting, it does in consequence give relief for waste done, either by way of account as for timber felled, or by obliging the party to rebuild, &c. as in case of houses, &c. and mentioned *Lord Barnard's Case*, as to Raby Castle, 2 Vern. But as to the repairs it was objected, that the plaintiff here had no remedy at law, by reason of the estate for life to the trustees mean between plaintiff's remainder in tail and defendant's estate for life, and that therefore equity ought to interpose, &c. and that this was a point of consequence. *Sed non allocatur*. MS. Rep. Mich. Vac. 1733.¹

PERROT v. PERROT.

CHANCERY. BEFORE LORD HARDWICKE, C. 1744.

[*Reported 3 Atk. 94.*]

THERE was a limitation in a settlement to the defendant for life, to trustees to preserve contingent remainders, to his first and every other son in tail, remainder to plaintiff for life,² with remainder to his first and every son in tail, reversion in fee to the defendant.

The first tenant for life³ cuts down timber, the plaintiff, who is the second tenant for life, brings his bill for an injunction to stay waste.

Mr. Attorney-General, for the plaintiff, showed cause why the injunction for restraining the defendant from committing any further waste should not be dissolved.

It was insisted by *Mr. Solicitor-General*, for the defendant, that the timber which he has cut down are decayed trees, and will be the worse for standing, and that it is of service to the public that they should be cut down; and that it is very notorious that timber, especially oak, when it is come to perfection, decays much faster in the next twenty years than it improves in goodness the twenty years immediately preceding.

That as the defendant has exercised this power in such a restrained manner, and confined himself merely to decayed timber, which grows worse every day, that this court will not interpose, especially as the plaintiff is not entitled to come into this court, as he has not the immediate remainder, and besides has no remedy at law.

LORD CHANCELLOR. The question here does not concern the interest of the public, unless it had been in the case of the king's forests and chases; for this is merely a private interest between the parties; and it is by accident that no action at law can be maintained against the

¹ See *Powys v. Blagrove*, 4 De G. M. & G. 448.

² Remainder to trustees to preserve contingent remainders. — REF.

³ Before he had any son born. — REF.

defendant, because no person can bring it but who has the immediate remainder.

Consider, too, in how many cases this court has interposed to prevent waste.

Suppose here the trustees to preserve contingent remainders had brought a bill against the defendant to stay waste for the benefit of the contingent remainders.

I am of opinion they might have supported it, but here it is the second tenant for life who has done it, and though he has no right to the timber, yet if the defendant, the first tenant for life, should die without sons, the plaintiff will have an interest in the mast and shade of the timber.

The case of Welbeck Park, which has been mentioned, was a very particular one, because there, by the accident of a tempest, the timber was thrown down, and was merely the act of God.

But this is not the present case, for here a *bare tenant for life* takes upon him to cut down timber, and it is not pretended that they are pollards only; and though the defendant's counsel have attempted to make a distinction between cutting down young timber trees that are not come to their full growth, and decayed timber, I know of no such distinction, either in law or equity.

Therefore, upon the authority of those cases, which have been very numerous in this court, of interposing to stay waste in the tenant for life, where no action can be maintained against him at law, as the plaintiff has not the immediate remainder, the injunction must be continued till the hearing.¹

FARRANT v. LOVEL.

CHANCERY. BEFORE LORD HARDWICKE. 1750.

[*Reported 3 Atk. 723.*]

A BILL was brought by a ground landlord to stay waste in an underlessee, who held by lease from the original lessee.²

LORD CHANCELLOR. A certificate being produced of the waste, I am of opinion the plaintiff has the same equity as in other cases of injunctions.

As where there is tenant for life, remainder for life, remainder in fee, yet the court, on a bill brought by remainder-man in fee, to stay waste in the first tenant for life, will, notwithstanding the inter-

¹ *Williams v. Duke of Bolton*, 3 P. Wms. 268, note (1), *acc.*

² It appears from the Register's Book, that this motion was made by Farrant, who was the assignee of a lease granted by one Atkinson, to whom the ground rent had been constantly paid. Reg. Lib. A. 1750. fol. 184.

mediate estate for life, upon a certificate of the waste, grant an injunction.¹

So, where a mortgagee in fee in possession commits waste by cutting down timber, and the money arising by the sale of the timber is not applied in sinking the interest and principal of his mortgage, the court, on a bill brought by the mortgagor to stay waste, and a certificate thereof, will grant an injunction.

So, likewise, where there is only a mortgage for a term of years, and the mortgagor commits waste, the court, on a bill by the mortgagee to stay waste, will grant an injunction, for they will not suffer a mortgagor to prejudice the incumbrance.

For these reasons his Lordship granted an injunction to stay waste.

GENT v. HARRISON.

CHANCERY. 1859.

[Reported *H. R. V. Johns*, 517.]

GEORGE GENT, by his will dated the 8th of July, 1808, devised certain real estate to the use of George William Gent for life, with remainder to trustees to preserve, with remainder to his first and other sons in tail male, with remainder to John Gould Gent for life, with remainder to the said trustees to preserve, with remainder to his first and other sons in tail male, with remainder to John Gent for life, with remainder to the said trustees to preserve, with remainder to his first and other sons in tail male, with remainder to the plaintiff George Gent for his life without impeachment of waste, with remainder to the said trustees to preserve, with remainder to his first and other sons in tail male, with remainder to William Gent in fee.

By certain codicils the testator revoked the ultimate devise in fee,

¹ "There are numerous cases in chancery, as Lord Hardwicke has frequently observed, in which the court has interposed to stay waste by the tenant where no action can be maintained against heirs at law. Thus, where there is a lessee for life, remainder for life, remainder in fee, the mesne remainder-man cannot bring waste, nor the remainder-man in fee; but chancery will interpose and stay the waste. . . . Chancery goes greater lengths than the courts of law in staying waste. It is a wholesome jurisdiction, to be liberally exercised in the prevention of irreparable injury, and depends on much latitude of discretion in the court." KENT, C., in *Kane v. Vanderburgh*, 1 Johns. ch. 11, 12.

"And one *Lutterel's* case was cited in my Lord Bridgman's time, where a bill was exhibited on behalf of an infant *in ventre sa mere* to stay waste, and an injunction granted upon it." *Hale v. Hale*, Prec. ch. 50.

An executory devisee may obtain an injunction to stay waste. *Robinson v. Litton*, 3 Atk. 209. So may a contingent remainder-man in general. *University v. Tucker*, 31 W. Va. 621.

A tenant for life, liable for waste, having sold the timber, cannot prevent the purchaser cutting it. *Wentworth v. Turner*, 3 Ves. 3.

and declared that the remainder of his real estates should go as the law might direct.

The testator died in 1838, and George William Gent entered and continued in possession of the devised estate until the 17th of March, 1855, when he died, without having had any issue male. John Gould Gent then entered, and continued in possession until the 26th of May, 1856, when he died, without having had any issue male. John Gent had previously died without having had any issue male. The plaintiff then entered, and had since continued in possession, and had never had any issue male. The bill alleged that the plaintiff had been unable to discover the testator's heir. In the year 1820 George William Gent cut a quantity of timber, and invested the greater part of the proceeds of the sale of it in the names of the trustees to preserve; and this fund consisted, at the date of the bill, of a debenture for £5,000 of the North Western Railway Company. The rest of the proceeds, amounting to £739 14s. 6d., were retained by the said George William Gent.

The trustees paid the income of the fund so invested to George William Gent, John Gould Gent, and the plaintiff, during their successive occupations.

In 1848 George William Gent cut other timber, which he sold; and it was agreed that the amount so received and appropriated should be taken to be £1,000, and the date of receipt Midsummer, 1854.

In 1856, John Gould Gent cut and sold other timber, and received the proceeds; and it was agreed that the amount should be taken to be £900, received on the 2d of January, 1856.

The said sums of £1,000 and £900 were paid by the executors of George William Gent and John Gould Gent respectively to the trustee who held the other fund.

The plaintiff, by his bill, claimed to have all the capital which had arisen from the sales of timber, and to be paid by the executors of George William Gent and John Gould Gent the amounts received by their respective testators as income of the fund in which the proceeds of the timber were invested. There was some conflict of evidence as to whether the timber was properly or improperly cut.

Mr. Rolt, Q. C., *Mr. Shapter*, Q. C., and *Mr. Busk*, for the plaintiff.

Mr. Willcock, Q. C., for the representatives of George William Gent.

Mr. Speed, for the representative of John Gould Gent.

Mr. Chapman, for the trustee.

VICE-CHANCELLOR SIR W. PAGE WOOD. The plaintiff would be put in very considerable difficulty if this were treated otherwise than as a proper cutting, followed by the investment of the proceeds for the purposes of the trust. The authorities seem to go to the full extent, that, where timber is properly cut for the benefit of the estate (as the Vice-Chancellor of England says in the case of *Waldo v. Waldo* [12 Sim. 107]), either by the act of the court, or out of court by

the act of trustees, which the court has adopted, there it is treated as so much of the estate. Thus, in a much earlier case, *Mildmay v. Mildmay* [4 B. C. C. 76], before Lord Thurlow, the court preferred not treating the proceeds as money, because that would change the character of the fund, but directed them to be invested in land, the effect being, that the tenant for life, although impeachable for waste, would obtain the benefit of the money when so invested. Therefore, where the timber is properly cut, the purchase-money of the timber follows the land, and the tenant for life, although impeachable for waste, receives the income during his life; and when you reach the first tenant for life unimpeachable for waste, as in the case of *Phillips v. Barlow* [14 Sim. 263], he takes the capital. There would therefore be no difficulty if the plaintiff in this case had treated the timber as having been properly cut, and the fund as being his from the date of his coming into possession of the estate; but he seeks the past interest on this ground (and it is only on this ground that he can seek it), that when the tenant for life, by his own wrong, creates the fund, as in *The Duke of Leeds v. Lord Amherst* [2 Ph. 117], and some other cases, the tenant for life shall not be allowed to avail himself of his own wrong, and to receive the interest from a fund which would never have existed but for his own wrongful act. But the cases which were cited have been cases of equitable waste, where, the whole matter having to be administered in equity, the legal right which might spring from such a wrongful act could never have arisen. In the case of legal waste, you have only to consider the legal consequences of the wrongful act as to which trover may be brought. There is no account asked for in this bill, for the whole amount is ascertained and settled, which was one of the points that arose in the last cited case of *Hony v. Hony* [1 S. & S. 568]. No account is asked of what timber has been cut, what it has been sold for, and the like. No account has been rendered, but the tenant for life, who has now come into possession unimpeachable for waste, comes into court with this simple case. He says: "I find the exact value of the timber cut; I ask for that value; I ask to have it paid to me; I ask to have the back interest paid on that; I do not ask for anything else: and I, being legal tenant for life unimpeachable for waste, say, this is my money." In that state of things, if he has any right at all, it is plainly a legal right, treating the original act as a wrong. There is nothing which the Court of Chancery is called upon to do; and, therefore, he should be left to his remedy at law. But who may have the legal right, is, I think, a matter of great doubt. I am by no means satisfied at present, that, when the timber was cut, assuming the cutting to have been a wrongful act from the first moment, it did not belong to the first person having an estate of inheritance. The limitations are to the tenants for life, with contingent remainders to their issue, and then a remainder to the tenant for life unimpeachable for waste, and remainders in tail to his issue. All the authorities are uniform in this

respect, that, where there has been an improper fall of timber on the estate by a person having a limited interest, the first owner of the inheritance is the person who has a right to bring trover, passing over all the intermediate estates. It certainly does not appear that there was, in any of these cases, an intervening tenant for life unimpeachable; but there were contingent remainders, that might come into *esse* and defeat the estate of inheritance vested in the heir or the person taking in remainder, as the case might be. The reason of the thing was this: that there must be the property in somebody when the wrongful act is done. The court will not allow the tenant impeachable for waste to avail himself of his own wrong; and the law therefore vests the timber wrongfully cut in the person having the first legal estate of inheritance. The answer made by Mr. Rolt is, "that the tenant for life, although in remainder, if he is unimpeachable for waste, as in *Lewis Bowles' Case*, has not merely an immunity from liability for waste, but the actual property in the timber. But how has he the property? The doctrine laid down in the 7th resolution in *Lewis Bowles' Case* is this: The clause without impeachment of waste gives a power to the lessee which will produce an interest in him, if he executes his power during the pendency of his estate. That is to say, if he ever comes into possession of the estate, and ever exercises his power of cutting the timber thereupon, the timber belongs to him; and the reason of its belonging to him, which is fully argued out, is this: It is said, if it had been without impeachment of waste by any writ of waste, then, by old authority, the action only would be discharged, and the lessor, after the fall of the timber, might nevertheless seize it; but when it is without impeachment of waste altogether, then the effect is, that the tenant for life cannot be interfered with in any manner in respect of that waste; and as soon, therefore, as he has exercised his power thereupon, the timber at once becomes his own property. But how does that prove, that, when the trees are felled by the wrongful act of some one preceding him, before his property has arisen thereupon, the property is in him? To say the least, that is a doubtful proposition; and that point I am asked to decide, not having the heir before me. The question is, whether such a point as that ought to be decided without the presence of the heir, and against the heir. I think the answer is plain, that, without hearing the heir upon it, I can come to no such conclusion. And further than that I see no reason to go. There seems to be considerable reason for a contention by the heir that his position is just the same in respect of a person having a possible power, which may arise if ever his estate arises, as it is in respect of the contingent interests of unborn issue, in favor of whom the law does not interfere to prevent the heir's right accruing at once, so as to enable him to bring trover immediately after the timber is cut. But there are further difficulties in the plaintiff's way, if he chooses to treat this as a tort. In the first place, of course the tort arose when the act was committed; and, if the plain-

tiff had a remedy by an action of trover, I apprehend the action should have been brought some twenty years ago, when the act took place.¹ That is the first difficulty. But, secondly, suppose the plaintiff has any right of action now of any kind, his remedy is clearly at law. He is the legal owner, and if he chooses to proceed at law by an action of trover, there is his remedy. In what respect does he want the aid of this court? He asks for no injunction; he asks for no account; he asks nothing which he has not got at law. Why should he come here to insist on his right? It is put in this way: It is said, a person commits a wrong, and hands over the fund which has resulted as the produce of his wrong to another, and says, "Take care of that; I have injured somebody or other, and I ask you to hold the proceeds for anybody who may be interested in them." I apprehend, even supposing the form of action might be varied, and that it might be an action for money had and received to plaintiff's use, the remedy would still be at law. It is not for me to determine the question, whether it should be an action of trover, or an action for money had and received. Still, taking it either way, what does the plaintiff come here for? In truth, it is only by treating the cutting as rightful, as an act which the court would recognize, that the plaintiff can have any ground for coming to this court. On that view, considering that the trustees were applied to in the first instance, there might be ground for directing an inquiry whether this cutting ought to be regarded as an act of the trustees, which the court would recognize, as it did in *Waldo v. Waldo*. If that were so, the plaintiff would be entitled to the whole of the money produced; but he would be clearly wrong in asking for the intermediate interest. If, on the other hand, he says: "You, the trustee, having received this sum of money as the proceeds of a wrongful act, ought to have held it for all the persons interested; you should not have paid any income to the wrongdoer himself, but you should have held it for me," — that contention entirely fails, because, if the act was wrongful, the remedy is at law, and not here. If he chooses to treat the timber as rightfully cut, then the tenant for life was entitled to interest, and all the plaintiff can get is the principal, his title to which does not seem to be disputed. What seems right for me to do is this, — either to dismiss the bill altogether, if the plaintiff insists on treating the cuttings as wrongful acts from the commencement, in which case I ought to dismiss it with costs; or else, if the plaintiff is content to treat the cuttings as rightful, then to make a decree for the payment to him of the capital derived from the proceeds of that timber. But I cannot do this unless the plaintiff waives any inquiry as to whether the cutting was rightful or not.

Mr. Rolt having consented to waive any inquiry, and to treat the timber as rightfully cut, the minutes of decree were as follows: —

¹ When, after legal waste has been committed, time has run so as to bar the legal remedy, the remedy in equity is also barred. *Higginbotham v. Hawkins*, L. R. 7 Ch. 676. — ED.

Dismiss the bill, with costs, as against the representatives of George William Gent and John Gould Gent; and, the plaintiff not asking any inquiry whether any of the timber was wrongfully cut, the funds in the hands of the trustee to be transferred to the plaintiff; the trustee's costs to come out of the fund.¹

C. *Equitable Waste.*

VANE v. LORD BARNARD.

CHANCERY. BEFORE LORD COWPER, C. 1717.

[Reported 2 Vern. 738.]

THE defendant on the marriage of the plaintiff his eldest son with the daughter of Morgan Randyll, and £10,000 portion, settled (*inter alia*) Raby Castle on himself for life, without impeachment of waste, remainder to his son for life, and to his first and other sons in tail male.

The defendant the Lord Barnard having taken some displeasure against his son, got two hundred workmen together, and of a sudden, in a few days, stript the castle of the lead, iron, glass-doors, and boards, &c., to the value of £3,000.

The court upon filing the bill, granted an injunction to stay committing of waste, in pulling down the castle; and now, upon the hearing of the cause, decreed, not only the injunction to continue, but that the castle should be repaired, and put into the same condition it was in. in August 1714, and for that purpose a commission was to issue to ascertain what ought to be repaired, and a Master to see it done at the expense and charge of the defendant the Lord Barnard; and decreed the plaintiff his costs.²

¹ "The only point remaining is, whether this tenant for life, not being tenant without impeachment of waste, has any property in the underwood cut, before his estate comes into possession. It is rightly assimilated to the case of tenant for life without impeachment of waste, supposing it only to relate to timber and not to underwood. Upon that it is clear, that tenant for life, without impeachment of waste cannot maintain trover. That was decided in the Court of King's Bench a few years ago upon a case reserved at the assizes upon the Home Circuit, and I think in Kent, which, I suppose, is not in print, or it would have been found by the counsel. There it was determined, that notwithstanding an estate for life without impeachment of waste in being, yet timber falling or cut vested immediately in the owner of the inheritance; for tenant for life without impeachment of waste has no right to the timber cut before his possession." *Per* BULLER, J., in *Pigot v. Bullock*, 1 Ves. Jr. 479, 483, 484.

See *Baker v. Sebright*, 13 Ch. D. 179.

As to the disposition of the proceeds of timber lawfully cut, under a settlement with contingent estates, see *Lushington v. Boldero*, 15 Beav. 1, and the Reporter's note.

² "A tenant for life, without impeachment of waste, is clearly not compellable to cut timber, in such way, as a tenant in fee would think most advantageous, but is entitled to cut down anything that is timber. This motion requires an affidavit,

ANONYMOUS.

[Reported 2 Eq. Cas. Ab. 757.]

A WOMAN tenant in tail, after possibility of issue extinct, was restrained from committing waste in pulling down houses or in cutting

pledging deponent, that the trees about to be cut are not fit for timber. It is settled, that a tree, which a tenant in fee, acting in a husband-like manner, would not cut, may be cut by a tenant for life, unimpeachable of waste, provided that it is fit for the purpose of timber. A tenant for life unimpeachable of waste might cut down all these trees, without question, at law; and to subject him, in this Court, to the rules which a tenant in fee might observe, for the purpose of husband-like cultivation, would deprive him of almost all his legal rights." LORD ELDON, C., in *Smythe v. Smythe*, 2 Swanst. 251.

"The doctrine of the Court is extremely well settled. If the object in planting timber, or in leaving timber standing, is ornament, whether that object is effected, whether the effect is truly ornamental, or the most absurd exhibition that ever was produced, this Court will protect that timber; and the protection is not confined to trees planted, or left standing as ornamental to a house or park: nor does it depend on the distance from the mansion; . . . The fact to be determined, is that it was planted for ornament, or if not originally planted for ornament, was, as we express it, left standing for ornament by some person having an absolute power of disposition. If such a proprietor had even the bad taste to plant or leave standing, a couple of yew trees cut in the shape of peacocks on the roadside, I do not shrink from what I laid down in *The Marquis of Downshire v. Lady Sandys* (6 Ves. 107), that they must be protected until some person, having the same absolute power of disposition with more correct taste, comes into possession; . . . But I do not agree, that a mere tenant for life, coming into possession, can vary the estate. That could be done only by some person having the absolute dominion over it." LORD ELDON, C., in *Wombwell v. Belasyse*, 6 Ves. 110 a, note.

"At law a tenant for life without impeachment of waste has the absolute power and dominion over the timber upon the estate, but this Court controls him in the exercise of that power, and it does so, as I apprehend, upon this ground, that it will not permit any unconscientious use to be made of a legal power. It regards such an unconscientious use of the legal power as an abuse, and not as a use of it. When, therefore, the Court is called upon to interfere in cases of this description, it is bound, I think, in the first place, to consider whether there are any special circumstances to affect the conscience of the tenant for life, for in the absence of special circumstances it cannot be unconscientious in him to avail himself of the power which the testator has vested in him. We have then to consider what are the special circumstances which the Court will regard as affecting the conscience of a tenant for life, and I apprehend that what is particularly to be regarded is the intention of the settlor or devisor. If by his disposition or by his acts he has indicated an intention that there should be a continuous enjoyment in succession of that which he has himself enjoyed, in the state in which he has himself enjoyed it, it must surely be against conscience that a tenant for life, claiming under his disposition should by the exercise of a legal power, defeat that intention." TURNER, L. J., in *Micklethwait v. Micklethwait*, 1 De G. & J. 504, 524. Approved by JESSEL, M. R., in *Baker v. Sebright*, 13 Ch. D. 179.

In *Obrien v. Obrien*, Ambl. 107, LORD HARDWICKE, C., granted an injunction against the assignee of a tenant for life without impeachment of waste, restraining him from cutting not only timber but any other trees growing for ornament or for the shelter of the mansion house.

In *Rolt v. Lord Somerville*, 2 Eq. Cas. Ab. 759, a tenant for life without impeachment of waste, pulled down houses, took up lead water pipes, and cut down orna-

down trees, which stood in defence of the house, and fruit trees in the garden; but for some turrets of trees which stood a land's length or two from the house the court would grant no injunction because she had by law power to commit waste; and yet notwithstanding she was restrained in the particulars aforesaid because that seems to be malicious.¹

mental trees. LORD HARDWICKE, C., at the suit of the next life-tenant, ordered the restoration of the houses and pipes. He also said that if an injunction concerning the trees had been sought before they were cut, it would have been granted, but since the trees could not be restored, the satisfaction for them was due to the owner of the inheritance.

¹ Tenant in tail may commit equitable waste. *Atty. Gen. v. Duke of Marlborough*, 3 Madd. 498; *Savil's Case*, cited in Mosely, 224.

A devisee in fee with an executory devise will be restrained from committing equitable waste. *Turner v. Wright*, 2 De G. F. & J. 234.

CHAPTER VIII.

BORDER TREES.

DIG. 47, 7, 6, 2. If a tree has extended its roots into the land of a neighbor, the neighbor cannot cut them off, but he can bring suit to have it declared that there is no right to have it projecting like a beam or tile. If a tree is nourished by roots in a neighbor's land, yet it belongs to him in whose land it had its origin.

INST. 2, 1, 31. If Titius put another's plant into his own ground, it will belong to him; and conversely if Titius puts his plant into Mævius's ground, it will be Mævius's plant, provided only that in each case it has struck root; but before it has struck root it continues his whose it was. But to such a degree is the property in a plant changed from the time of its striking root, that if a neighbor's tree encroach on the ground of Titius so as to strike its roots into his land, we say that the tree belongs to Titius; for reason does not allow a tree to be considered as belonging to any one but him in whose land it has struck root: and therefore a tree placed near a boundary, if it strike root in the neighbor's land, becomes common property.¹

MASTERS v. POLLIE.

KING'S BENCH. 1620.

[Reported 2 Roll. R. 141.]

TRESPASS *quare clausum fregit et asportavit* his boards. The defendant justifies because that there was a great tree which grew between the closes of the plaintiff and of the defendant, and that part of the roots of this tree extended into the close of the defendant, and that the tree was nourished by the soil, and that the plaintiff cut down the tree and carried it away into his own close, and sawed it into boards, and the defendant entered and took some of the boards and carried them away, *prout ei bene licuit*, and on this the plaintiff demurred.

Harris. The plea is not good, for although some of the roots of the

¹ Bracton (lib. 2, c. 2, § 6, fol. 10), after giving the substance of the passage from the Institutes, adds, "Nor can the neighbor cut off the roots. And this is true, if my tree has struck root in a neighbor's land, without which roots it cannot live, because it ought to be common; but if it can live well enough without those roots, it will not be common."

tree are in the defendant's soil, yet the body of the main part of the tree being in the plaintiff's soil, therefore all the rest of the tree belongs to him also, and so Bracton holds; but if the plaintiff had planted a tree in the soil of the defendant, then it will be otherwise, *quod Curia concessit*. But MONTAGU, Chief Justice, said the plaintiff cannot limit the roots of the tree, how far they shall grow and go; *vide* 2 Edw. IV. 23.¹

ANONYMOUS.

KING'S BENCH. 1622.

[*Reported 2 Roll. R. 255.*]

If a tree grows in a hedge which divides the land of A. and B., and by the roots takes nourishment in the land of A. and also of B., they are tenants in common of this tree; and so it was adjudged.

WATERMAN *v.* SOPER.

NISI PRIUS. 1698.

[*Reported 1 Ld. Raym. 737.*]

It was ruled by HOLT, Chief Justice, at Lent assizes at Winchester, upon a trial at Nisi Prius 1697-8: 1. That if A. plants a tree upon the extremest limits of his land, and the tree growing extend its root into the land of B. next adjoining, A. and B. are tenants in common of this tree. But if all the root grows into the land of A., though the boughs overshadow the land of B., yet the branches follow the root, and the property of the whole is in A. 2. Two tenants in common of a tree, and one cuts the whole tree; though the other cannot have an action for the tree, yet he may have an action for the special damage by this cutting; as where one tenant in common destroys the whole flight of pigeons.

HOLDER *v.* COATES.

NISI PRIUS. 1827.

[*Reported 1 Mon. & M. 112.*]

TRESPASS for cutting a tree of the plaintiff.

The plaintiff's land, and that of the defendant, adjoined each other, the plaintiff's land being rather the higher, and the separation between

¹ See s. c. 2 Roll. R. 207.

the two being by a hedge belonging to the plaintiff, and standing at the extremity of his ground, on the bank or declivity descending to that of the defendant. The trunk of the tree stood in the defendant's land, but some of the lateral or spur roots grew into the land of both parties; and evidence was given on the part of the plaintiff to show that there was no tap root, and that all the principal roots, from which the tree derived its main nourishment, were those which grew into the plaintiff's land. The defendant, on the other hand, gave evidence that there was a tap root, growing entirely in his land, and that the spur roots grew alike in the lands of both parties.

On the part of the defendant it was contended that, upon the evidence, the tree must be taken as belonging entirely to his land; but that, at all events, it derived part of its nourishment from his land, and that the plaintiff and defendant in that case would be tenants in common of the tree, according to the rule in the case of *Waterman v. Soper*, 1 Lord Raym. 737; and in that case the action of trespass could not be supported.

LITTLEDALE, J. There is another case on that subject (*Masters v. Pollie*, 2 Roll. Rep. 141), in which it was considered that, if a tree grows in A.'s close, though the roots grow in B.'s, yet the body of the tree being in A.'s soil, the tree belongs to him. I remember, when I read those cases, I was of opinion that the doctrine in the case of *Masters v. Pollie* was preferable to that in *Waterman v. Soper*; and I still think so. However, if the question becomes material, I will give you leave, on the authority of that case, to move to enter a nonsuit.

His lordship, in summing up to the jury, said, that with respect to any question which had been raised as to the proportion of nourishment derived by the tree from the soil of the plaintiff and defendant, he did not see on what grounds the jury could find for either party; but that the safest criterion for them would be, to consider whether, from the evidence given as to the situation of the trunk of the tree above the soil, and of the roots within it, they could ascertain where the tree was first sown or planted; if they thought it was first set in the land of the plaintiff, they would find a verdict for him; for the defendant, if the tree had originally been set in his. If they could form no opinion on this subject, he would afterwards give them his direction on the questions which they would then have to consider.

The jury saying that they could not tell in whose ground the tree first grew, a verdict for the defendant was taken by consent, on terms agreed on between the parties.

Russell, Serjt., and *Whitcombe* for the plaintiff.

Campbell and *Ludlow*, Serjt., for the defendant.

LYMAN v. HALE.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1836.

[Reported 11 Conn. 177.]

THIS was an action of trespass *quare clausum fregit*, alleging, that the defendant, on the 19th of October, 1835, entered upon the plaintiff's land, described in the declaration, and gathered, carried away and converted to his own use a great number, viz. twenty bushels, of the plaintiff's pears, growing and being upon a certain pear-tree of the plaintiff standing upon the land described. On the trial before the County Court, November term, 1835, it was proved and admitted, that at the time of the alleged trespass, the plaintiff owned and possessed the *locus in quo*; that the defendant, at the same time, as a tenant, was also in the lawful possession of a lot of land adjoining, on the south side, to the plaintiff's land, the latter being raised two or three feet above the former; that a pear-tree then was, and for many years had been, standing and growing on the plaintiff's land, a little more than four feet from the line between his land and that occupied by the defendant; that the trunk of this tree, at the distance of five feet above the ground, was about seventeen inches in diameter, and grew up perpendicularly about eight feet, and then divided itself into several branches, some of which had extended to some distance across the line and over the defendant's land; and that from these branches the defendant picked and gathered six bushels of pears and converted them to his own use, claiming a right to do so. For the taking and appropriation of these pears, the action was brought.

It was proved, on the part of the defendant, that two of the roots of the tree, one of about two inches in diameter, and the other a little smaller, together with several others from an eighth to half an inch in diameter, had entered his land.

The plaintiff offered testimony to prove, and claimed that he had proved, that this tree had, for more than twenty-five years, stood in the same situation in which it did at the time of the alleged trespass, and extended its branches, in like manner, over the defendant's land; and that, during all that time, the plaintiff had exclusively gathered and appropriated to his own use the pears from the parts of the tree projecting over the defendant's land, as well as from the other parts, and had the sole use and occupancy thereof, claiming exclusive title thereto; and that neither the defendant, nor those under whom he claimed, had ever gathered the pears, or exercised any right of ownership over the tree, or the fruit thereof, or claimed any title thereto. This claim of the plaintiff was resisted by the defendant.

The plaintiff claimed, that from the facts proved and admitted, the branches of the tree, which extended over the defendant's land and the

pears growing thereon, as well as the other parts of the tree, belonged to him and were his property; and that the defendant had no right to gather the pears from such projecting branches and appropriate them to his own use, as he had done; and consequently, that the plaintiff was entitled to recover in this action; and he requested the court so to charge the jury.

The plaintiff further claimed, that if from the facts proved and admitted, he had no title to the pears gathered by the defendant, yet if the jury should find, that the plaintiff had, for more than fifteen years next before the alleged trespass, exclusively gathered and appropriated to his own use the pears growing upon the branches projecting over the defendant's land, and exclusively exercised acts of ownership over the tree and such branches, claiming title thereto, he had thereby become the owner thereof, and had the sole property in the pears gathered by the defendant; and requested the court so to instruct the jury. The defendant claimed, that from the facts proved and admitted, he was either the tenant in common or joint owner with the plaintiff, or the exclusive owner of the pears so gathered by him; and that in either case, he had a right to gather them and appropriate them to his own use, and consequently that the action could not be maintained; and he requested the court so to charge the jury. The defendant also resisted the plaintiff's claim to the pears from fifteen years' exclusive enjoyment, and requested the court to charge the jury in opposition to such claim.

The court charged the jury as follows: "The owner of land has not only a right to the soil, but the right, in contemplation of law, includes everything in a direct line upward to the heavens, and everything downwards to the centre of the earth. The owner of the surface of the ground owns all that is over and under it.

"If a tree stand in the division line between two persons' lands, they are tenants in common of the tree, or are joint owners of it. If one plants a tree near the extreme limits of his land, and the roots do not extend into the land of the adjoining proprietor, he who planted it will own the whole tree, although the branches overhang and overshadow the land of the adjoining proprietor; but if the tree so planted, in growing extend its roots into the land of the adjoining proprietor, whereby it derives a portion of its sustenance from the land of both, they are tenants in common of the tree; and the universal practice in Connecticut has been for each to take the fruit overhanging his own land.

"As it regards the usage, or the right by possession, the law is, that to obtain it, the person claiming it is bound to show, by strict proof, that he has had actual, exclusive, uninterrupted, and adverse possession, for the period of fifteen years, under a claim of title. It is also necessary, that the possession should have been definitely marked, and certain, and invariably the same; and if the possession claimed is land, it must be marked by definite boundaries.

"In this case, the court instruct you, that if you find the roots of the tree extended into the land of the defendant, and the branches overhanging it, he had a right to gather the fruit on those branches, unless the plaintiff has acquired an exclusive right by possession."

The jury returned a verdict for the defendant; and the plaintiff, having filed a bill of exceptions, brought a writ of error in the Superior Court. The judgment of the County Court was then affirmed; whereupon the plaintiff brought the case before this court, by motion in error.

Hungerford and *Cone*, for the plaintiff in error.

Johnson and *Chapman*, for the defendant in error.

BISSELL, J. This writ of error is reserved for our advice; and the principal question raised and discussed, is, whether, upon the facts disclosed on the record, the plaintiff and defendant are joint owners, or tenants in common, of the tree in controversy.

It is admitted that the tree stands upon the plaintiff's land, and about four feet from the line dividing his land from that of the defendant. It is further admitted that a part of the branches overhang, and that a portion of the roots extend into, the defendant's land. If, then, he be a joint owner of the tree with the plaintiff, he is so in consequence of one or the other of these facts, or of both of them united. It has not been insisted on, in the argument, that the mere fact, that some of the branches overhang the defendant's land, creates such a joint ownership. Indeed, such a claim could not have been made, with any well-grounded hope of success. It is opposed to all the authorities, and especially to that on which the defendant chiefly relies. "Thus" (it is said) "if a house overhang the land of a man, he may enter and throw down the part hanging over, but no more; for he can abate only that part which constitutes the nuisance." 2 Roll. 144, 1, 30; *Rex v. Pappineau*, 2 Stra. 688; *Cooper v. Marshall*, 1 Burr. 267; *Welsh v. Nash*, 8 East, 394; *Dyson v. Collick*, 5 Barn. & Ald. 600; Com. Dig. tit. Action on the case for a nuisance, D. 4. And in *Waterman v. Soper*, 1 Ld. Raym. 737, the case principally relied on, by the defendant's counsel, it is laid down: "That if A. plants a tree upon the extremest limits of his land, and the tree growing extend its root into the land of B. next adjoining, A. and B. are tenants in common of the tree. But if all the root grows in the land of A., though the boughs overshadow the land of B., yet the branches follow the root, and the property of the whole is in A."

The claim of joint ownership, then, rests on the fact that the tree extends its roots into the defendant's land, and derives a part of its nourishment from his soil. On this ground, the charge proceeded, in the court below; and on this, the case has been argued in this court. We are to inquire, then, whether this ground be tenable. The only cases relied upon, in support of the principle, are, the cases already cited from Ld. Raymond, and an anonymous case from Rolle's Reports (2 Roll. 255). The principle is, indeed, laid down in several of our

elementary treatises. 1 Sw. Dig. 104 ; 3 Stark. Ev. 1457 n. ; Bul. N. P. 84. But the only authority cited is the case from *Ld. Raymond*. And it may well deserve consideration, whether that case is strictly applicable to the case at bar ; and whether it carries the principle so far as is necessary to sustain the present defence. That case supposes the tree to be *planted* on the “*extremest limit*” — that is, on the *utmost point or verge* — of A.’s land. Is it not then fairly inferable, from the statement of the case, that the tree, when grown, stood in the dividing line ? And in the case cited from *Rolle*, the tree stood *in the hedge*, dividing the land of the plaintiff from that of the defendant. Is it the doctrine of these cases, that whenever a tree, growing upon the land of one man, whatever may be its distance from the line, extends any portion of its roots into the lands of another, they therefore become tenants in common of the tree ? We think not ; and if it were, we cannot assent to it. Because, in the first place, there would be insurmountable difficulties in reducing the principles to practice ; and, in the next place, we think the weight of authorities is clearly the other way.

How, it may be asked, is the principle to be reduced to practice ? And here, it should be remembered, that nothing depends on the question whether the branches do or do not overhang the lands of the adjoining proprietor. All is made to depend solely on the inquiry, whether any portion of the roots extend into his land. It is this fact alone, which creates the tenancy in common. And how is the fact to be ascertained ?

Again ; if such tenancy in common exist, it is diffused over the whole tree. Each owns a certain proportion of the whole. In what proportion do the respective parties hold ? And how are these proportions to be determined ? How is it to be ascertained what part of its nourishment the tree derives from the soil of the adjoining proprietor ? If one joint owner appropriate all the products, on what principle is the account to be settled between the parties ?

Again ; suppose the line between adjoining proprietors to run through a forest, or grove. Is a new rule of property to be introduced, in regard to those trees growing so near the line as to extend some portions of their roots across it ? How is a man to know whether he is the exclusive owner of trees, growing, indeed, on his own land, but near the line ; and whether he can safely cut them, without subjecting himself to an action ?

And again ; on the principle claimed, a man may be the exclusive owner of a tree, one year, and the next, a tenant in common with another ; and the proportion in which he owns may be varying from year to year, as the tree progresses in its growth.

It is not seen how these consequences are to be obviated, if the principle contended for be once admitted. We think they are such as to furnish the most conclusive objections against the adoption of the principle. We are not prepared to adopt it, unless compelled to do so by

the controlling force of authority. The cases relied upon for its support have been examined. We do not think them decisive. We will very briefly review those, which, in our opinion, establish a contrary doctrine.

In the case of *Masters v. Pollie*, 2 Roll. Rep. 141, it was adjudged, that where a tree grows in A.'s close, though the roots grow in B.'s, yet the body of the tree being in A.'s soil, the tree belongs to him. The authority of this case is recognized and approved by Littledale, J., in the case of *Holder v. Coates*, 1 Moo. & Malk. 112. He says: "I remember, when I read those cases, I was of opinion that the doctrine in the case of *Masters v. Pollie* was preferable to that in *Waterman v. Soper*; and I still think so."

The same doctrine is also laid down in *Millen v. Fandrye*, Pop. Rep. 161, 163; *Norris v. Baker*, 3 Bulstr. 178; see also 20 Vin. Abr. 417; 1 Chitt. Gen. Pr. 652. We think, therefore, both on the ground of principle and authority, that the plaintiff and defendant are not joint owners of the tree; and that the charge to the jury, in the court below, was, on this point, erroneous.

It is, however, contended, that although the charge on this point was wrong, there ought not to be a reversal, as upon another ground the defendant was clearly entitled to judgment in his favor.

It is urged, that land comprehends everything in a direct line above it; and therefore, where a tree is planted so near the line of another's close that the branches overhang the land, the adjoining proprietor may remove them. And in support of this position, a number of authorities are cited. The general doctrine is readily admitted; but it has no applicability to the case under consideration. The bill of exceptions finds, that the defendant gathered the pears growing on the branches which overhung his land, and converted them to his own use, claiming a title thereto. And the charge to the jury proceeds on the ground that he has a right so to do. Now, if these branches were a nuisance to the defendant's land, he had clearly a right to treat them as such, and as such to remove them. But he as clearly had no right to convert either the branches or the fruit to his own use. *Beardstee v. French*, 7 Conn. Rep. 125; *Welsh v. Nash*, 8 East, 394; *Dyson v. Collick*, 5 Barn. & Ald. 600; 2 Phill. Ev. 138.

On the whole, we are of opinion that there is manifest error in the judgment of the court below, and that it be reversed.

The other judges ultimately concurred in this opinion; Williams, Ch. J., having at first dissented, on the ground of a decision of the Superior Court in Hartford county (*Fortune v. Newson*), and the general understanding and practice in Connecticut among adjoining proprietors.

*Judgment reversed.*¹

¹ So *Skinner v. Wilder*, 38 Vt. 115. See *Lemmon v. Webb*, [1894] 3 Ch. 1.

GRIFFIN v. BIXBY.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE. 1841.

[Reported 12 N. H. 454.]

TRESPASS, for breaking and entering the plaintiff's close, in Litchfield, November 1, 1838, and on other days, &c.

Plea, the general issue.

Hugh Nahor, the former husband of Elizabeth Bixby, who is one of the defendants, was the owner of a farm in Litchfield. Upon his death, her dower in said farm was set off, April 12, 1815, by a committee appointed for that purpose. In the return of the committee they described the southerly line of the tract set off as running from "a pine tree marked, with stones at the root," north 82 degrees east, "to the east end of said lot." There are acknowledged monuments at each end of this line, but the return of the committee did not designate any intermediate monuments.

The defendants offered evidence, that at the time the dower was set off, the committee in fact surveyed and marked a line through a tract of wood-land, varying somewhat from a straight line, extending further south, and thus including the *locus in quo*; and that there has since been a cutting of wood, by the occupants, on both sides, up to this marked line.

The plaintiff derives title from the heirs of Nahor, to the land adjoining the dower, and he contended that this evidence could not be received to control the return of the committee.

There was evidence that a part of the distance between the corners was cleared, and a fence built, which varies from a straight line, but corresponds with the first monument found in the woods.

There was further evidence tending to show that one or more of the trees alleged to have been marked upon the line as monuments, had been cut and carried away.

The questions arising upon the foregoing case were reserved for the consideration of this court.

Farley, for the plaintiff.

J. U. Parker, for the defendants.

PARKER, C. J. If the committee had not run out and marked a line when they set off the dower of Mrs. Nahor, the course mentioned in the return must have determined the boundary between the parties; and parol evidence could not have been admitted to show that there was previously a marked line there, varying from the course, and that the committee intended to adopt that line. *Allen v. Kingsbury*, 16 Pick. R. 235. But in this case the committee marked a line, and in this respect the present case differs from that just cited, where the monuments

were not erected at the time the dower was set off, but at some antecedent period, and for some purpose not known or explained.

As the monuments in this case were marked at the time by the committee, and intended to designate the land set off, we are of opinion that this constituted an actual location, and that they must control the course mentioned in the return. *Brown v. Gay*, 3 Greenl. R. 126; *Ripley v. Berry*, 5 Greenl. 24; *Esmond v. Tarbox*, 7 Greenl. R. 61; *Thomas v. Patten*, 13 Me. R. 329; *Prescott v. Hawkins*, 12 N. H. 20, 26; and see 1 U. S. Digest, 474. The evidence offered tends to show that the parties understood that the line was marked and established by monuments, and acted with reference to that fact; which strengthens the case, and shows the propriety of the rule. *Jackson v. Ogden*, 7 Johns. R. 241; *Clark v. Munyan*, 22 Pick. R. 410.

As to the second question: in *Waterman v. Soper*, 1 Ld. Raym. 737, cited for the defendants, Holt, C. J., ruled that if A. plants a tree on the extremest limits of his land, and the tree growing extend its root into the land of B., next adjoining, A. and B. are tenants in common of this tree, and that where there are tenants in common of a tree, and one cuts the whole, though the other cannot have an action for the tree, yet he may have an action for the special damage by this cutting. What action he shall have is not stated, nor is it quite clear that such an ownership can be established, if the root merely extend into the other's land.

But in Co. Lit. 200 b, it is said, "If two tenants in common be of land, and of mete stones, *pro metis et bundis*, and the one take them up and carry them away, the other shall have an action of trespass *quare vi et armis* against him, in like manner as he shall have for the destruction of doves."

And in *Cubitt v. Porter*, 8 B. & C. 257, it was held that "the common user of a wall separating adjoining lands, belonging to different owners, is *prima facie* evidence that the wall, and the land on which it stands, belong to the owners of those adjoining lands in equal moieties, as tenants in common;" and "where such an ancient wall was pulled down by one of the two tenants in common, with the intention of rebuilding the same, and a new wall was built, of a greater height than the old one, it was held that this was not such a total destruction of the wall as to entitle one of the two tenants in common to maintain trespass against the other."

It seems to have been admitted that for an entire destruction of the wall by one, trespass might have been sustained.

Without going to the extent of the ruling in Lord Raymond, we are of opinion that a tree standing directly upon the line between adjoining owners, so that the line passes through it, is the common property of both parties, whether marked or not, and that trespass will lie if one cuts and destroys it without the consent of the other. See cases cited in *Odiorne v. Lyford*, 9 N. H. Rep. 511.¹

¹ See *Robinson v. Clapp*, 65 Conn. 365, 67 Conn. 538.

HOFFMAN v. ARMSTRONG.

COMMISSION OF APPEALS OF NEW YORK. 1872.

[Reported 48 N. Y. 201.]

APPEAL from judgment of the General Term of the Supreme Court in the Seventh Judicial District, affirming a judgment for the plaintiff entered on a verdict. The action is for assault and battery. (Reported 46 Barb. 337.)

The facts are these: Dr. Hoffman and the defendant were the owners of adjoining lands, separated by a line fence. There was a cherry tree standing upon the land of Dr. Hoffman with limbs overhanging the land of the defendant. The plaintiff, who was a sister of Dr. Hoffman, and lived with him, went upon the line fence and undertook to pick cherries from a limb of the tree which overhung the defendant's land. He forbade her, and on her still persisting, the defendant attempted to prevent her by force, and did her a personal injury.

The court held, and so charged the jury, that "every person upon whose lands a tree stands owns the whole of that tree, notwithstanding portions of it may overhang the lands of another; and in this case, as it is conceded that the body or trunk of the tree was wholly upon the land of Dr. Hoffman, he was entitled to all the fruit growing thereon, and hence, if the defendant attempted to prevent the plaintiff from picking such fruit by violence he was a wrong-doer, and this action lies against him. If he touched her at all, with the intention of preventing her from picking the cherries while she was standing on the premises or fence of Dr. Hoffman, although they were upon the limbs overhanging his yard, then this action lies against him, and your verdict should be for the plaintiff."

The defendant excepted to the several legal propositions contained in the charge, and requested the judge substantially to charge that the limbs of the tree overhanging the land of the defendant belonged to him, that he was entitled to the fruit thereon, and that he had the right to prevent the plaintiff from picking it by the application of all necessary force, if she refused to desist after being requested to do so. This was refused, and exceptions were taken to such refusals.

Amasa J. Parker, for the appellant.

H. V. Howland, for the respondent.

LOTT, Ch. C. The only material question presented in this case is, whether the owner of land overhung by the branches of a fruit tree standing wholly on the land of an adjoining owner is entitled to the fruit growing thereon.

The defendant claims that the ownership of land includes everything above the surface, and bases his claim on the maxim of the law, "*Cujus est solum ejus est usque ad cœlum*," and that consequently he was the

owner of the overhanging branches and the fruit thereon. The general rule unquestionably is, that land hath in its legal signification an indefinite extent upward, including everything terrestrial, not only the ground or soil, but everything which is attached to the earth, whether by the course of nature, as trees, herbage, and water, or by the hands of man, as houses and other buildings. (See Co. Lit. 4 a; 2 Black. Com. 18; 3 Kent's Com., p. 401; 2 Bouvier's Ins. § 1570.)

This rule, while it entitles the owner of the land to the right to it, and to the exclusive use and enjoyment of all the space above it, and to erect any superstructure thereon that he may see fit, — and no one can lawfully obstruct it to his prejudice, — yet if an adjoining owner should build his house so as to overhang it, such an encroachment would not give the owner of the land the legal title to the part so overhanging. It would be a violation of his right, for which the law would afford an adequate remedy, but would not give him an ownership or right to the possession thereof. (See *Aiken v. Benedict*, 39 Barb. 400.)

Although different opinions have been held as to the rights of owners of adjoining land in trees planted, the bodies of which are wholly upon that of one, while the roots extend and grow into that of the other and derive nourishment therefrom, it was considered by Allen, J., in giving the opinion of the court in *Dubois v. Beaver*, 25 N. Y. Rep. 123, etc., that the tree is wholly the property of him upon whose land the trunk stands. This principle is sustained in *Masters v. Pollie*, 2 Rol. Rep. 141; *Holder v. Coates*, 1 Moody & Malkin, 112.

The ground or reason assigned in those cases for holding that the owner of land on which no part of a tree stands, but into which the roots extend, has any interest, is that the tree derives its nourishment from both estates, and not the ground or maxim on which the defendant's claim is based.

We have not been referred to any case showing that where no part of a tree stood on the land of a party, and it did not receive any nourishment therefrom, that he had any right therein, and it is laid down in Bouvier's Institutes (section 1573) that if the branches of a tree only overshadow the adjoining land, and the roots do not enter into it, the tree wholly belongs to the estate where the roots grow. (See also *Masters v. Pollie*, 2 Rol. Rep. 141; *Waterman v. Soper*, 1 Ld. Raymond, 737.)

The rule or maxim giving the right of ownership to everything above the surface to the owner of the soil has full effect without extending it to anything entirely disconnected with or detached from the soil itself.

It follows, from the views above expressed, that the ruling of the judge at the Circuit was right, and the judgment appealed from must be affirmed, with costs.

All concur.

Judgment affirmed.

NOTE. — "I cannot see how that a bare denial of a thing detained shall make a conversion: *Thumblethorpe's Case*, a lessee, at the end of his term, leaves a timber log on the ground; afterwards he demands it. A denial of this, without some other act done,

shall not make a conversion of this, if he doth not remove this, and so makes some other special conversion. *Legere* in one sense is to gather. If upon evidence to a jury, there a denial is good evidence to prove a conversion, but if he saith that he had locked it up, and brought it into the court, here *stabitur presumptioni donec in contrarium probetur*; this is no conversion, if the contrary be not proved." *Per COKE, C. J.*, in *Isaack v. Clark*, 2 Bulst. 306, 314 (1615).

"If trees grow in my hedge, and the fruit of such a tree hangs over your land, and falls on your land, I can justify the collection of it, if I do not make too long a stay there or break down his [your] hedge. Because ripe fruit naturally falls." *Per DODDERIDGE, J.*, in *Millen v. Fawdry*, Latch, 119, 120 (1626).

